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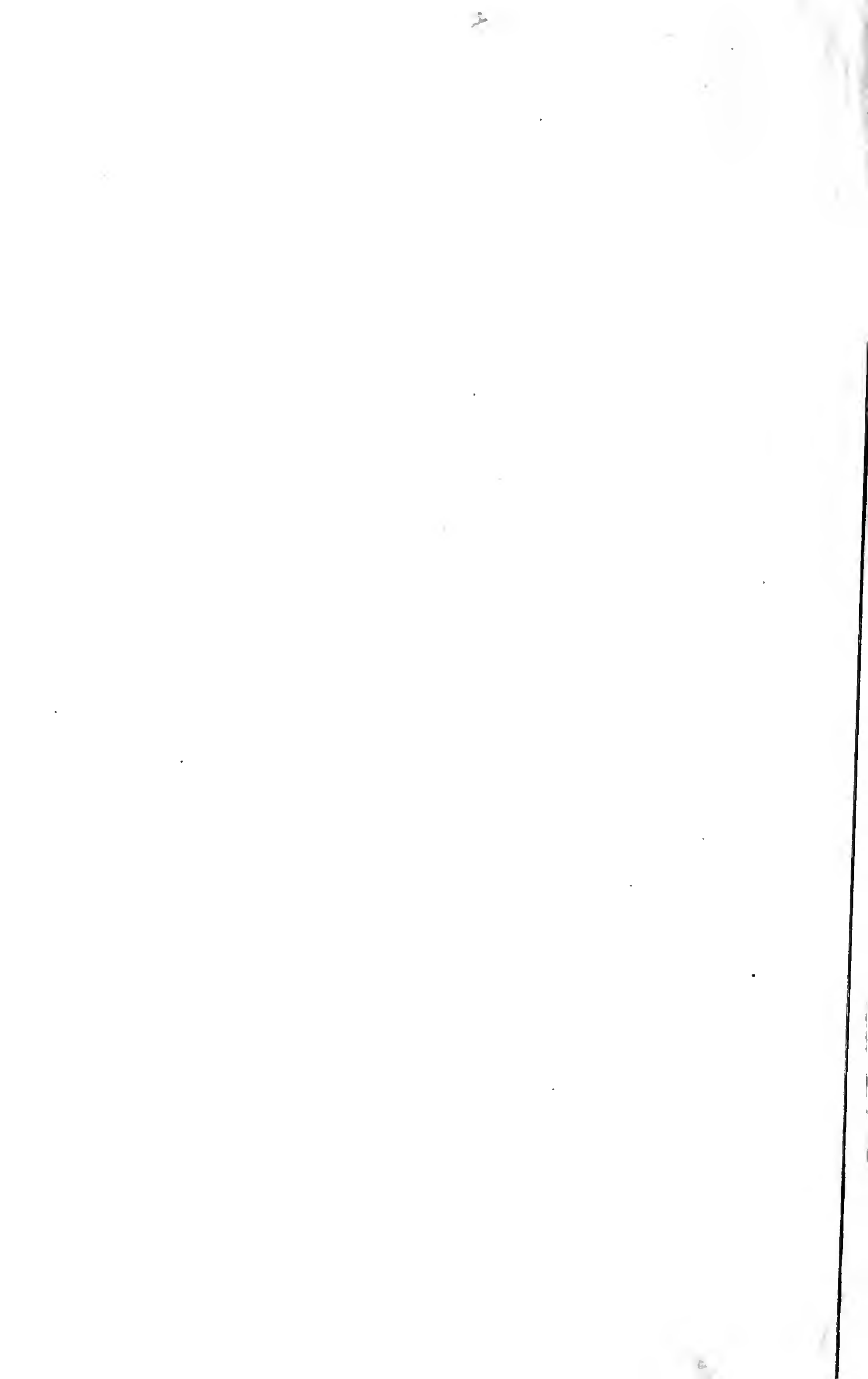

1180

No. 3205

1180

United States
Circuit Court of Appeals
For the Ninth Circuit.

TWENTY-ONE MINING COMPANY, a Corporation,
Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, Inc., a Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

FILED
SEP 17 1918
F. D. MONCKTON
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States, Ninth Circuit, in and for the Northern District of California, Southern Division.

DEPT. No. ——.

TWENTY ONE MINING COMPANY, a Corporation,

Plaintiff,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INC., a Corporation,

Defendant.

Complaint.

Now comes the plaintiff in the above-entitled action, and for cause of action against said defendant, alleges:

I.

That plaintiff now is, and at all times herein stated, has been a corporation organized and existing under and by virtue of the laws of the State of Arizona, having its principal place of business in the city of Phoenix in said State, and doing business in Sierra County, State of California, by virtue of compliance with the laws of the last mentioned State.

II.

That the defendant, Original Sixteen-To-One Mine, Inc., now is, and at all times herein stated, has been a corporation organized and existing under and by virtue of the laws of the State of California.

III.

That this plaintiff is now, and at all times hereinafter stated, has been a citizen and resident of the

State of Arizona, and that the defendant now is and at all times hereinafter [1*] stated, has been a resident and citizen of the State of California.

IV.

That the matter in dispute in this action, exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000) Dollars.

V.

That there is involved in this action, the construction of a statute of the United States.

VI.

That plaintiff now is, and at all times herein stated, has been the owner and entitled to the possession, and in the actual possession of the Valentine Quartz Lode Mining Claim, situated in Sierra County, State of California, and described as follows:

> "BEGINNING at Corner No. 1, a pine post 4 feet long, set in the ground with mound of stone, scribed V-1-5128-0-7-4640, a pine 6 inches in diameter bears North 12° East 19.70 feet, a pine 6 inches in diameter bears North 63° West 27.50 feet, each blazed and scribed V-1-5128-B T., from which the South quarter of Section corner of Section 34, Township 19 North, Range 10 East, M. D. M. bears South 4° 36′ West 863.47 feet.
>
> Thence North 1° 51′ East 254.47 feet to corner No. 2, said corner being identical with corner No. 6 of the Belmont Lode hereinafter described.
>
> Thence North 31° 9′ West 246.47 feet to cor-

*Page-number appearing at foot of page of original certified Transcript of Record.

ner No. 3, a post set in the ground with mound of stone scribed V-3-5128.

Thence North 62° 48′ East 1.68 feet to corner No. 4, a post set in the ground with mound of stone scribed V-4-5128.

Thence South 56° 33′ East 457.62 feet to corner No. 5, a post set in the ground with mound of stone scribed V-5-5128- E. Q. M. [2]

Thence South 59° 15′ East 82 feet to corner No. 6, a post set in the ground with mound of stone scribed V-6-5128-0-6-4640.

Thence South 62° 48′ West 375.95 feet to corner No. 1, the place of beginning."

VII.

That the plaintiff now is, and at all times hereinafter stated, has been the owner of, and entitled to the possession and in the actual possession of the Belmont Quartz Lode Mining Claim, situated in the County of Sierra, State of California, and described as follows:

"BEGINNING at a pine post 4 feet long, set in the ground with mound of stone scribed B-1-5128 and being corner No. 1, from which a pine tree 18 inches in diameter bears 8.20° W. 16.25 feet and another pine 18 inches in diameter bears N. 13° W. 3 feet, each blazed and scribed B-1-5128-B T., from which the South quarter section corner of Section 34, Township 19 North, Range 10 East, M. D. M., bears South 3° 49′ W. 557.72 feet.

Thence North 31° 44′ W. 139.55 feet to corner No. 2, a pine post set in the ground with

mound of stone scribed B-2-Tx-4-5128-15-1-3-5104.

Thence North 53° 4′ East, 20.40 feet to corner No. 3, a post set in the ground with mound of stone scribed B-3-5128.

Thence North 51° 41′ West 623.20 feet to corner No. 4. (This corner is in the center of the Alleghany-Nevada City Road, and no permanent post is set.)

Thence North 60° 49′ East, 523.43 feet to corner No. 5, a post 4 feet long set in the ground with mound of stone scribed B-5-5128-c-2-4717.

Thence South 31° 9′ East, 249.97 feet to corner No. 6, a post set in the ground with mound of stone scribed B-6-V-2-5128.

Thence South 1° 51′ West 546.17 feet to corner No. 7, a post set in the ground with [3] mound of stone scribed B-7-5128.

Thence South 60° 49′ West 25.96 feet to corner No. 1, the place of beginning."

VIII.

That underneath the surface of said Belmont and Valentine Quartz Lode Mining Claims, and within the surface boundaries of said claims dropped downward perpendicularly, there exists a valuable vein of quartz, rock and earth in place, containing valuable minerals; that this plaintiff in good faith, heretofore claimed, and still claims the ownership of said vein as a part and portion of said Belmont Mining Claim, but that the District Court of the United States, Ninth Circuit, for the Northern District of California, Southern Division, heretofore rendered

a decree in a certain suit therein pending, in which the defendant herein was plaintiff, and plaintiff herein was a defendant, determining that the apex of said vein is located and exists within the surface boundaries of defendant's mining location and claim, and that said vein belongs to the defendant herein; that the time for appeal from such decree by the defendant therein, has not as yet expired and said decree has not become final; that during the pendency of the suit in which said decree was entered, an injunction was issued restraining the defendant herein from working or mining on said vein beneath the surface of said Belmont and Valentine Mining Claims, but by said decree, such injunction was dissolved, and this plaintiff has not had opportunity to take the necessary proceedings to apply for an order that said injunction against the defendant herein be continued during said appeal.

That by and under the terms of said decree heretofore [4] referred to, the said defendant claims the right to work and mine the said vein at any and all points beneath the surface of said Belmont and Valentine Quartz Lode Mining Claims, and threatens to, and will commence the working of extracting and removing the ores from said vein immediately.

IX.

Plaintiff further alleges that the said defendant in the further working and mining of said vein beneath the surface of said Belmont and Valentine Quartz Lode Mining Claims, will excavate and remove rock and earth therefrom and create large and

extensive openings underneath the surface thereof, and entirely outside the limits or boundaries of said vein.

X.

Plaintiff further alleges that in order that the said vein be worked by said defendant underneath the surface of said Belmont and Valentine Claims speedily, and without the expenditure of large amounts of money which would be necessary to perform said mining and work within the limits of said vein, said defendant will go outside the boundaries and limits of said vein and commit great and irreparable injury and damage upon said claims underneath the surface thereof, by digging up, excavating and removing quartz, rock and earth therein.

XI.

Plaintiff further alleges that defendant, unless restrained by this Court, will, in its further workings and mining of said vein underneath the surface of said Belmont and Valentine Claims, enter upon said claims and each of them underneath the surface thereof at points outside and beyond the limits and boundaries of said vein and dig up, excavate and remove large [5] quantities of earth and rock which are now the substance of said claims, to the great and irreparable injury to plaintiff.

Plaintiff alleges that it has no plain, adequate or complete remedy at law.

WHEREFORE, plaintiff prays that an injunction issue out of this Court directed to said defendant, Original Sixteen-To-One Mine, Inc., restraining it and its agents, servants, employees and confed-

erates, and each of them, from entering into or upon any part or portion of the said Belmont and Valentine Mining Claims, or any part thereof, outside the limits or boundaries of said vein hereinabove described, and from digging up, excavating or removing any of the quartz, rock or earth therein, outside the said limits or boundaries of said vein in or underneath the surface of said Belmont and Valentine Mining Claims, or either of them; that a restraining order be issued to the same effect until an application for such injunction can be made under the rules and practice of this court; that plaintiff be granted a decree perpetually enjoining said defendant, its agents, servants, employees and confederates, and each of them, from entering into or upon any part of the said Belmont and Valentine Quartz Lode Mining Claims, or either of them, and from digging up, excavating or removing any of the quartz, rock or earth therein, which is outside of the boundaries or limits of said vein, as hereinabove described; for costs of suit, and for such other and further relief as may seem meet and just.

FRANK R. WEHE,
BERT SCHLESINGER,
JNO. B. CLAYBERG,
Attorneys for Plaintiff. **[6]**

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

Joseph H. Hunt, being first duly sworn, deposes and says:

I am an officer of the corporation, Twenty-One

Mining Company, plaintiff named in the foregoing complaint, to wit: President thereof, and I make this affidavit in behalf of said plaintiff.

I have read the foregoing bill of complaint and know the contents thereof; the same is true of my own knowledge, except as to such matters and things as are therein stated upon information or belief, and as to such matters I believe it to be true.

(Signed) JOSEPH H. HUNT.

Subscribed and sworn to before me this 25th day of June, 1918.

[Seal] JOHN E. MANDERS,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jun. 26, 1918. Walter B. Maling, Clerk. [7]

[Title of Court and Cause.]

Answer.

The defendant in the above-entitled action by way of answer to the complaint on file herein admits, denies and alleges as follows:

I.

Admits that plaintiff is a corporation, as more fully set forth in paragraph I of said complaint.

II.

Admits that plaintiff is a corporation, as more fully set forth in paragraph II of said complaint.

III.

Admits that diversity of citizenship as alleged in paragraphs II of said complaint.

IV.

Denies that the matter in dispute in this action exceeds, exclusive of interest and costs, the sum of $3,000 and on the other hand alleges that the matter in dispute in this action, has a value far less than the sum of $3,000.

V.

Denies that there is involved in this action the construction of a statute of the United States, but alleges [8] that the statute in question is plain on its face and that the questions involved in this action are merely the application of said plain and unambiguous statute to the particular facts in question.

VI.

Defendant alleges that it has neither information nor belief sufficient to enable it to answer that portion of paragraph VI of said complaint where it is alleged that plaintiff is the owner of the Valentine quartz lode mining claim therein described, and basing its denial upon that ground it denies that plaintiff is or was at the times mentioned in said complaint the owner of said claim; and defendant alleges that it is informed and believes and basing its denial upon such information and belief denies that plaintiff is or was at all the times mentioned in said complaint entitled to the possession or in the actual possession of said Valentine quartz mining claim, or any portion thereof, and basing its allegation upon such information and belief alleges that the Valentine Mines Company is entitled to the possession and is in the actual possession of said claim.

VII.

Defendant alleges that it has neither information nor belief sufficient to enable it to answer that portion of paragraph VI of said complaint where it is alleged that plaintiff is the owner of the Belmont Quartz Lode Mining claim therein described, and basing its denial upon that ground it denies that plaintiff is or was at the time mentioned in said complaint the owner of said claim; and defendant alleges that it is informed and believes and basing [9] its denial upon such information and belief denies that plaintiff is or was at all the times mentioned in said complaint entitled to the possession or in the actual possession of said Belmont quartz mining claim, or any portion thereof, and basing its allegation upon such information and belief alleges that the Valentine Mines Company is entitled to the possession and is in the actual possession of said claim.

VIII.

Defendant admits that at all the times mentioned in said complaint and there now is underneath the surface of what plaintiff claims to be is Belmont and Valentine quartz lode mining claims and within the surface boundaries of said claims extended downward vertically there exists a valuable vein of quartz, rock and earth in place containing valuable minerals, and denies that plaintiff has now or at any of the times mentioned in said complaint, any claim or right to, or ownership of said vein or any part or portion thereof, and defendant admits that this District Court has heretofore rendered a decree in a certain suit therein pending, Equity No. 292, in

which the defendant herein was plaintiff, and plaintiff herein was a defendant, determining that the apex of said vein is located and exists within the surface boundaries of defendant's Sixteen to One mining location and claim, and that said vein belongs to the defendant herein; that the time for appeal from such decree by the defendant therein has not yet expired and said decree has not become final in the sense that an appeal may yet be taken therefrom; that during the pendency of the suit in which the decree was entered an injunction was issued **[10]** restraining the defendant herein from working or mining on said vein beneath the surface of its alleged Belmont and Valentine mining claims; that by said decree such injunction was dissolved and defendant denies that this plaintiff has not had opportunity to take the necessary proceedings to apply for an order that said injunction against the defendant herein be continued during an appeal, if an appeal be taken; but, on the other hand, defendant alleges that said decree became final for the purposes of appeal on or about the first day of June, 1918, when an order was entered denying a petition for a new trial and a motion to vacate said decree, and defendant further alleges that plaintiff has had ample time within which to take an appeal and take the necessary proceedings for an application for an order that said injunction against this defendant be renewed during such appeal.

Defendant admits that under and by virtue of the terms of said decree, this defendant claims the right to work and mine the said vein at any and all points

VII.

Defendant alleges that it has neither information nor belief sufficient to enable it to answer that portion of paragraph VI of said complaint where it is alleged that plaintiff is the owner of the Belmont Quartz Lode Mining claim therein described, and basing its denial upon that ground it denies that plaintiff is or was at the time mentioned in said complaint the owner of said claim; and defendant alleges that it is informed and believes and basing [9] its denial upon such information and belief denies that plaintiff is or was at all the times mentioned in said complaint entitled to the possession or in the actual possession of said Belmont quartz mining claim, or any portion thereof, and basing its allegation upon such information and belief alleges that the Valentine Mines Company is entitled to the possession and is in the actual possession of said claim.

VIII.

Defendant admits that at all the times mentioned in said complaint and there now is underneath the surface of what plaintiff claims to be is Belmont and Valentine quartz lode mining claims and within the surface boundaries of said claims extended downward vertically there exists a valuable vein of quartz, rock and earth in place containing valuable minerals, and denies that plaintiff has now or at any of the times mentioned in said complaint, any claim or right to, or ownership of said vein or any part or portion thereof, and defendant admits that this District Court has heretofore rendered a decree in a certain suit therein pending, Equity No. 292, in

which the defendant herein was plaintiff, and plaintiff herein was a defendant, determining that the apex of said vein is located and exists within the surface boundaries of defendant's Sixteen to One mining location and claim, and that said vein belongs to the defendant herein; that the time for appeal from such decree by the defendant therein has not yet expired and said decree has not become final in the sense that an appeal may yet be taken therefrom; that during the pendency of the suit in which the decree was entered an injunction was issued **[10]** restraining the defendant herein from working or mining on said vein beneath the surface of its alleged Belmont and Valentine mining claims; that by said decree such injunction was dissolved and defendant denies that this plaintiff has not had opportunity to take the necessary proceedings to apply for an order that said injunction against the defendant herein be continued during an appeal, if an appeal be taken; but, on the other hand, defendant alleges that said decree became final for the purposes of appeal on or about the first day of June, 1918, when an order was entered denying a petition for a new trial and a motion to vacate said decree, and defendant further alleges that plaintiff has had ample time within which to take an appeal and take the necessary proceedings for an application for an order that said injunction against this defendant be renewed during such appeal.

Defendant admits that under and by virtue of the terms of said decree, this defendant claims the right to work and mine the said vein at any and all points

beneath the surface of said alleged Belmont and Valentine Quartz mining claim, and defendant admits that it has already commenced the work of extracting and removing the ores from said vein and is now engaged in so doing.

IX.

Defendant denies that in the further working of said vein beneath the surface of said alleged Valentine and Belmont quartz mining claims, it will excavate rock and earth therefrom, or create large or extensive openings beneath the surface thereof and entirely outside the limits or boundaries of said vein. But, on the other hand, defendant [11] alleges that in the mining of said vein beneath the surface of said alleged claims that it will strictly keep within the rights granted to it by the mining statutes which permits it to pursue said vein extralaterally, and that in the mining of said vein it has not heretofore and will not in any respect exceed the rights granted it by said statute and confirmed by said decree.

X.

Defendant admits that if it be compelled to follow all the sinuousities, curvatures and variations of said vein and construct its work accordingly and be compelled to depart from the running of straight workings, such as are customary, proper and reasonable in the conduct of mining operations that it could not work said vein without the expenditure of large amounts of money which will be necessary to perform said mining and work within the strict and technical limits and wall boundaries of said vein; but defendant denies that by going outside of the

boundaries and limits of said vein to the slight extent that is required by the reasonable, practical, customary, ordinary and common methods of mining, that it will commit great or irremediable or any injury or damage upon or to said claims underneath the surface thereof, or otherwise, by digging up or excavating or removing whatever quartz or rock or earth my be found in such workings; that no quartz of any value has been encountered in such workings or is likely to be, and that whatever quartz is and has been encountered is a part of the main vein found in small feeders and crevices, such as is commonly found in the country rock in the immediate vicinity of a main vein. [12]

XI.

Defendant further denies that it will, unless restrained by this court in its further workings and mining of said vein underneath the surface of said Belmont and Valentine claims, enter upon said claims, or either or them, or any portion thereof, at points outside and beyond the limits and boundaries of said vein and dig up or excavate or move large or any quantities of earth or rock which are now the substance of said claims to the great or irreparable, or any, injury whatsoever to plaintiff, and defendant alleges that it intends to remove such small quantities of barren and worthless country rock in the immediate vicinity of said vein in the walls thereof as may be necessary for the profitable and economic working of said vein and as may be reasonably necessary for such purposes and in accordance with the customs and usages of the art

and science of mining under similar circumstances. And this defendant assures this Honorable Court that it will use more than ordinary care and caution because of the unfounded complaint which has been made by the plaintiff herein and will keep within said vein and in the immediate vicinity thereof with its workings, so that there can be no possibility whatever of any legitimate charge made that defendant in the pursuit of its vein is or will exceed in any respect the lawful latitude allowed and granted to it by the mining statute and the said decree, herein referred to, confirming the same.

Defendant denies that plaintiff has no plain, adequate or complete remedy at law; but, on the other hand, alleges that plaintiff has a plain, adequate and complete **[13]** remedy at law and that equity should not take cognizance. **[14]**

As a further and separate answer and defense, this defendant alleges that to issue a temporary restraining order or a preliminary injunction in this matter as prayed for by plaintiff will result in great inconvenience and hardship to defendant and put it to great additional expense if it be compelled to follow the vein sinuosities and curvatures and variations and to handle its ores through such openings exclusively and be not permitted to conduct its mining operations in the ordinary and customary manner in entire accordance with the usages and customs of the modern art and science of mining as aforesaid, and depart from the vein to the very limited extent reasonably necessary and that to so restrain and enjoin this defendant will profit plaintiff noth-

ing and plaintiff if denied a restraining order and a preliminary injunction will suffer no hardship nor inconvenience nor damage irreparable or otherwise, whatsoever; [26] that the relative inconvenience that will be caused each party hereto by the granting or withholding of an injunction or restraining order will be utterly one-sided and disproportionate and would operate most inequitably against this defendant to its great pecuniary loss and would render the right to pursue its vein extralaterally beneath said Belmont and Valentine surface granted to it by the federal mining statute and confirmed by said decree of this court of greatly diminished value whereas on the other hand the plaintiff will suffer no damage whatever by reason of any acts of this defendant either past, present, or contemplated.

WHEREFORE, defendant prays that this Honorable Court enter a decree confirming its right to mine said vein through all reasonably necessary workings and defining the same and that in said decree it be adjudged that this defendant has not in the past exceeded its rights incident to the mining of said vein as aforesaid nor violated nor infringed on nor interfered with any right of plaintiff arising by virtue of its alleged ownership of said Belmont and Valentine mining claims or otherwise.

W. E. COLBY,
JOHN S. PARTRIDGE,
GRANT H. SMITH,
CARROLL SEARLS,
Attorneys for Defendant. [27]

State of California,
City and County of San Francisco,—ss.

S. B. Connor, being first duly sworn on his oath says:

That he is an officer of the defendant company herein, to wit: its vice-president; that he has read the foregoing answer and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

S. B. CONNOR.

Subscribed and sworn to before me this 28th day of June, 1918.

[Seal] MARIE FORMAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires, Aug. 19, 1919.

[Endorsed]: Service by copy of within "Answer" admitted this 28th day of June, 1918. F. R. Wehe, Bert Schlesinger, Jno. B. Clayberg. Filed Jun. 28, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [28]

[Title of Court and Cause.]

Statement of Proceedings or Bill of Exceptions.

PLAINTIFF'S STATEMENT OR BILL OF EXCEPTIONS ON APPLICATION FOR PRELIMINARY INJUNCTION.

BE IT REMEMBERED that the above-named

plaintiff heretofore and on or about the 26th day of June, 1918, filed in the above Court and Cause its certain complaint against the above-named defendant.

That on or about the same day plaintiff filed in said Court and Cause the affidavit of Frank L. Sizer in support of an application for a preliminary injunction against said defendant, which affidavit is in words and figures following:

(Title of Court and Cause.)

(Venue)

Affidavit of Frank L. Sizer in Support of Application for Preliminary Injunction.

Frank L. Sizer being duly sworn on his oath, says:

That he is a mining engineer, and is famiilar with the properties known as the Sixteen to One Mining Claim, the Belmont Mining Claim and the Valentine Mining Claim; that he is also familiar with the underground workings and excavations beneath the Belmont and Valentine Mining Claims heretofore made by either or both parties to this suit, or by anyone claiming under them, or either of them; that underneath the surface of said Belmont and Valentine Mining Claims and within the surface boundaries of said claims dropped downward perpendicularly, there exists a valuable vein of quartz, rock and earth in place, containing valuable minerals; that the plaintiff in this action, has heretofore claimed, and still claims the ownership of said vein as a part

and portion of said Belmont Mining Claim, but that the District Court of the United States, Ninth Circuit, for the the Northern District of California, Southern Division, heretofore rendered a decree in a certain suit therein pending, in which the defendant herein was plaintiff, and plaintiff herein was a [29—1] defendant, determining that the apex of said vein is located and exists within the surface boundaries of defendant's Sixteen to One Mining Claim, and that said vein belongs to the defendant herein; that the time for appeal from such decree by the defendant therein, has not as yet expired and said decree has not become final; that during the pendency of said suit in which said decree was entered, an injunction was entered, restraining the defendant herein from working or mining the said vein beneath the surface of the said Belmont and Valentine Mining Claims, but by said decree, said injunction was dissolved and plaintiff herein has not had opportunity to take the necessary proceedings to apply for an order that said injunction against the defendant herein, be continued during said appeal.

That it appears by said workings, that the defendant, Original Sixteen to One Mine, Inc., has heretofore in many instances, departed from the said vein so underlying the surface of the Belmont and Valentine Quartz Lode Mining Claims, and has heretofore and prior to the commencement of this suit, made the following excavations outside the boundaries of said vein above described, viz.: Under the Valentine, sinking a shaft for a distance of 105 feet

which is 6 feet by 12 feet in size; an incline raise 20 feet in length and 4 feet by 6 feet in size; under the Belmont Claim running a tunnel or cross-cut 230 feet long 4 by 6½ feet in size; a cross-cut 30 feet long 4 feet by 6 feet in size, and a cross-cut 20 feet long, 5 feet by 6 feet in size.

That S. B. Connor, vice-president of defendant Company has filed an affidavit in a certain suit pending in the United States District Court, Ninth Circuit, in and for the Northern District of California, Southern Division, in which the Original Sixteen to One Mine, Inc. (the defendant herein) is plaintiff and the Twenty-One Mining Company (plaintiff herein), is defendant, and in said affidavit said Connor states:

"That said affiant has had an experience extending over forty years in the development of mines and the running of mine workings and that it is the universal practice in following a vein either horizontally or on its inclination to drive such working on a more or less straight course rather than to follow all of the undulations and rolls of the actual vein so long as the working keeps in close touch with the vein; that it would be a practicable and economic impossibility to follow all the sinuosities of the vein and keep the working entirely within the vein, more especially in the sinking of an incline shaft and in the case of a working incline shaft a nearly straight course must be followed in order that the necessary track and working of hoisting, etc., can be carried on efficiently. Where the general course of the vein changes abruptly, a change of direction

in the shaft will naturally follow in order to keep in close touch with the vein. In sinking the incline shaft on the Sixteen to One Vein, the superintendent at the mine used his best judgment in following the vein, and that departure of the shaft from the vein is not greater than will be justified in economic and practical mining."

That William A. Simpkins, a Mining Engineer and a witness in behalf of defendant in the same action, as above stated, filed an affidavit for and on behalf of the defendant herein, in which said Simpkins stated: **[30—2]**

"Affiant further declares that it is the usual practice to run mine workings in or near the vein, and that where the vein has many undulations, it would be impracticable and uneconomic to follow all the variations of the vein, but the miner does the best he can."

That it appears from the testimony taken in the case above referred to, that the vein lying underneath the surface of said Valentine and Belmont Mining Claims, the apex to which is claimed by the defendant herein to be located in the Sixteen to One Mining Claim owned by the defendant, is undulating and waving in its character and of variable width, narrowing down in some instances to about two feet between the walls thereof, and in other places widening out to a width of over eight feet between its walls. That if the said defendant follows the practice in which it has heretofore been engaged, and follows the judgment of its superintendent Connors and Mining Engineer Simpkins, wherever there is an

undulation or wave in said vein, instead of following such undulation or wave, it will depart from said vein and excavate its tunnels, levels, cross-cuts, shafts, winzes, and upraises entirely outside of said vein, and in the country rock which is a part and portion of the substance of either the said Valentine Mine or the said Belmont Mining Claim.

That in and by a certain verified answer to a complaint filed herein in the Superior Court of the State of California, in and for the County of Sierra, for ejectment, in which plaintiff herein is plaintiff and defendant herein is defendant, and brought to recover the possession of the said excavations so heretofore made by said defendant beneath the surface of the Valentine and Belmont and other mining claims, it is admitted by the said defendant, that said defendant has made the excavations alleged in said complaint outside the boundaries of said vein, and underneath the surface of the said Valentine and Belmont Mining Claims, and claims and alleges that it had the right so to do, and that each and all of said excavations heretofore made by said defendant as hereinabove stated, except the cross-cut tunnel 230 feet long, 4 feet by 6 feet in size, were made for the sole purpose of following said vein lying underneath the surface of the said Valentine and Belmont Claims in its downward course, and to mine said ores and to excavate and remove the same to the surface, and were necessary, essential and proper for such purposes; that each and all of said excavations were necessary and incident to the proper and beneficial working of the said vein; that the same

and each thereof were incident, necessary, appurtenant and appendant to the right to mine ore from the said vein and constitute a reasonable exercise of such incident, accessory, appendant and appurtenant right, and are each and all necessary and essential for the reasonable, beneficial and profitable use and enjoyment of said defendant's property in the said vein and minerals therein; that the same and each of them were run in entire accordance with the principles and customs of modern mining as applied to the excavations of ore from veins similarly situated, and are reasonably necessary and incident to the profitable and beneficial working of said vein.

That the said Sixteen to One Mining Claim, the Belmont Mining Claim and the Valentine Mining Claim, are located and situated in Sierra County, State of California, at the distance [31—3] of about 190 miles from the City of San Francisco, and that it would require at least three days, after any representative of the plaintiff company at said mine, ascertained that the defendant in the pretended working and mining of said vein, had passed outside the boundaries thereof, and was working and excavating in the country rock beneath the surface of either the Valentine or Belmont Mining Claims, before a restraining order or an injunction could be applied for and issued and served upon said company by use of the utmost diligence, and before said restraining order or injunction could be applied for and be obtained and served, large quantities of the substance of the Belmont and Valentine Mining Claims could be broken down, extracted and removed

by the defendant in the continuation of its pretended mining and working of the said vein; that in the opinion and judgment of affiant, the said defendant might place many workmen and miners at many different levels underneath the surface of said Belmont or Valentine Mining Claims at points entirely outside of the vein above referred to, and that such men might excavate, break down and carry away large amounts of the substance of said Belmont and Valentine Mining Claims before this plaintiff, or any of its officers or employees, could be informed thereof, and before any proceedings could be instituted for obtaining an injunction against the defendant, restraining it from doing such work; that in many instances, work which the defendant deems important to its successful and economical working and mining of said vein, might be done by it entirely outside of the boundaries of said vein and beneath the surface of said Valentine and Belmont Mining Claims and be so completed and in the use of said defendant before this plaintiff, or any of its employees, had knowledge that such work was done or being done, and before this plaintiff could, by the exercise of the utmost diligence, apply for an injunction or restraining order against said defendant to prevent it from doing any work outside the boundaries of said vein.

That under the decree of the United States District Court, Ninth Circuit, in and for the Northern District of California, Southern Division, entered in the suit above mentioned, the defendant is now in possession of and working said vein, and in pos-

session of the said openings, and that the plaintiff and its agents, employees, workmen and officers are excluded therefrom, and that unless the defendant be enjoined from making any excavations outside the boundaries of said vein and beneath the surface of said Belmont and Valentine Mining Claims, the said defendant could and might make large excavations outside of said vein and destroy the substance of the said Belmont and Valentine Mining Claims, without any knowledge thereof being acquired by the plaintiff or any of its agents, officers, workmen or employees.

FRANK L. SIZER.

Subscribed and sworn to before me this 25th day of June, 1918.

JOHN E. MANDERS,

Notary Public in and for the City and County of San Francisco, State of California,

That on or about the 26th day of June, 1918, an Order [32—4] was duly made by the Honorable William H. Hunt one of the Judges of the United States Court of Appeals, Ninth Circuit, which order provided that the defendant in this action to wit: ORIGINAL SIXTEEN TO ONE MINE, INC., should show cause before this Court on Friday, July 5th, 1918, at the Courtroom of this Court in the post-office building, city and county of San Francisco, State of California at the hour of 10 o'clock in the forenoon of said day or as soon thereafter as counsel could be heard, as to why preliminary injunction prayed for should not issue; that said order further provided that the defendant herein Original Sixteen

To One Mine, Inc., should be restrained from doing or performing the acts complained of until said order to show cause had been heard and decided a true copy of said order is as follows:—

(Title of Court and Cause.)

On reading and filing the verified complaint of the plaintiff in the above-entitled action, praying for a preliminary injunction against the above-named defendant, restraning it and its officers, agents, servants and employees and each of them, from entering into or upon any part or portion of the Belmont and Valentine Quartz Lode Mining Claims outside the limits and boundaries of that certain vein lying beneath the surface of said claims and described in said complaint, and from digging up, excavating or removing any rock or earth outside the limits or boundaries of said vein, in or underneath the surface of said Belmont and Valentine Mining Claims, or either of them; and on reading the affidavit of Frank L. Sizer in support of the issuance of such injunction, and on motion of John B. Clayberg, one of the solicitors for plaintiff, it is hereby

ORDERED, that said defendant, Original Sixteen-To-One Mine, Inc. show cause, if any it has, before one of the Judges of **[33—5]** this court, at the courtroom of this court, Department No. 2 in the Post Office Building, in the City and County of San Francisco, State of California, on the 5th day of July, 1918, at the hour of Ten o'clock in the forenoon of said day, why said injunction should not be granted, and in the meantime, it is hereby,

ORDERED, that said defendants, its agents, servants and employees and each of them, be restrained from doing any of the acts above mentioned, until the hearing of said order to show cause; it is further

ORDERED, that the plaintiff may, upon the hearing of said order to show cause, present such other or further affidavits as it may desire, in support of the issuance of said injunction provided that copies of the same are served upon the defendant at least 8 days before said hearing; and it is further

ORDERED, that a copy of said complaint and affidavit and this order be served upon said defendant at least 5 days before the said 5th day of July 1918.

Dated June 26, 1918.

WM. H. HUNT,
Judge.

THAT thereafter to wit on the First day of July 1918, the attorneys for said plaintiff, after said defendant had given notice of a motion to dissolve said restraining order, confessed in open Court that said restraining order had been improperly issued and should be dissolved, and the same was thereupon dissolved by this Court.

THAT on or about the 28th day of June 1918 the defendant herein filed in said Court and cause its verified answer to said complaint.

THAT on the same day the defendant filed in said Court and Cause the affidavit of S. B. Connor, which is as follows: **[34—6]**

(Title of Court and Cause.)

(Venue.)

Affidavit of S. B. Connor.

S. B. Connor, being first duly sworn, deposes and says: that he is a mining engineer and is vice-president of the defendant corporation; that he has for many years been familiar with the Sixteen to One Mine and workings thereof; that he has read the Bill of Complaint in the above-entitled cause and the affidavit of Frank L. Sizer filed therein and is familiar with the contents of each thereof. That this District Court, through the Honorable Frank H. Rudkin, a Judge thereof, heretofore entered a decree in a certain suit pending therein, whereby this defendant was awarded the right to all of the vein found in the workings of both plaintiff and defendant beneath the surface of the Belmont and Valentine Mining Claims and between vertical planes passed through the Southerly end line of the Sixteen to One claim and a point 770 feet Northerly from said Southerly end line, and plaintiff in that suit, the defendant in this, was awarded the right to follow said vein on its downward course indefinitely and beneath said Belmont and Valentine claims.

That said right to mine said vein on its dip carries with it the necessary and incidental right of prosecuting all workings which are reasonably necessary for the purpose of extracting the contents of said vein; that in its mining the defendant herein has used absolute good faith in making only such excavations as are reasonably necessary for the purpose

of following said vein on its downward course and extracting the ore therefrom and enjoying the benefit thereof, and that with one exception the workings described on page 2 of said affidavit of said Sizer are each and all reasonably necessary for the purposes aforesaid.

The one exception is the tunnel or crosscut 230 feet long, running underneath the surface of the Belmont Claim. This tunnel was run under a former management upwards of five years ago. It was run under a mistaken belief by the then management of the Company that it had a right to run said tunnel; that defendant was advised upwards of two years ago by its attorneys that it had no such right, and in the litigation pending between these parties just referred to, in which the said decree was rendered, it was admitted by defendant that it had made a mistake in running said crosscut, claimed no right thereto, and it has not for a long time past made any claim thereto adverse to the plaintiff herein; that the segment of shaft described on page 2 of said Sizer affidavit, as being underneath the Valentine Claim, is at all places in close touch with said vein, being not more than fifteen or twenty feet distant therefrom at any point, and at its lower end is rapidly approaching said vein again so that in the course of a short distance it will encounter said vein; that said shaft was run beneath said vein for said distance since it is the main working shaft of the Sixteen to One claim and was so run in order to keep the same comparatively straight since as straight a course as possible is essential for the economic work

of hoisting, etc., in a main working shaft, and it would be, from the standpoint of economic mining, an impossibility for said shaft to follow all the curvatures and undulations of said vein which varies in dip and strike in comparatively short distances, and is also frequently faulted; that these faults have almost invariably resulted in the lower segment of vein below the fault being found lower than it would [35—7] normally be if it followed its regular dip, and this was one of the main reasons which induced the management of the defendant to run said shaft immediately under said vein so that if it were faulted again as it had been repeatedly in the workings just above that the vein would more easily be picked up in the shaft on its extension downward. That to run said shaft immediately under said vein and in the foot wall is a common mining practice, for the foot wall in the Sixteen to One is composed of more solid material and requires less timbering and the ore can be worked more profitably than if said shaft should be run down on said vein. That the incline raise 20 feet in length, described in said Sizer affidavit as being found beneath the surface of the said Belmont Claim is for the purpose of reaching said vein. That said workings described in said Sizer affidavit as existing beneath the surface of the Belmont Claim, with the exception of the 230 foot tunnel or crosscut consist of two small workings which form an ore pocket and shoot in the vicinity of the 300 foot level of said shaft and is reasonably necessary for the economic and profitable working of said Sixteen to One mine and the vein above described.

That each and all of said workings are in hard country rock, many hundred feet beneath the surface of the Belmont and Valentine claims, with no vein or veins or ore, or ore minerals, of any character found or disclosed therein; that said workings have caused said plaintiff no damage whatsoever and their financial and pecuniary loss by reason of said workings would not amount to anything. That this defendant has no intention and will not depart from said vein in the prosecution of its work to any greater extent than herein specified and with the utmost good faith it has every intention of confining its workings in the future as closely as possible to said vein consistent with economic and profitable mining and in accordance with the usages and customs of the art and science of mining.

On page 6 of said affidavit of said Sizer he sets forth a hypothetical case as to what might be done if defendant should place many workmen and miners at different levels in the Sixteen to One workings underneath the Belmont and Valentine claims and that such men might excavate and carry away large amounts of the Belmont and Valentine claims; that the condition pictured by said Sizer is highly imaginative, visionary, impracticable, would serve no useful purpose and is beyond any thought or plan of this defendant; that it is affiant's belief that said statement was inserted in said affidavit without any foundation of fact as far as the intentions or opportunities of this defendant are concerned to do the acts and things there mentioned; and said statement was inserted in said affidavit for the sole purpose of

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inducing this Court to believe that irremediable damage to plaintiff was contemplated by defendant and was possible when such is not the fact; that it will be impossible under existing conditions for defendant to get many workmen and miners, which it has no intention or desire to do, and there would be no object in penetrating the country rock as there set forth, and defendant has never threatened or contemplated or intended doing anything of the sort, and it would be impossible within the brief space of time that would intervene between an application for a preliminary injunction and the hearing for any irremedial damage to be done to plaintiff. **[36—8]**

That at the time plaintiff's counsel applied to this Honorable Court for a restraining order they well knew that defendant's counsel were in the City and County of San Francisco and could have been reached on the telephone within a very few minutes' time and could have appeared before this Honorable Court to show cause why said restraining order should not be issued.

That plaintiff in this action on May 25, 1918, filed an action in ejectment against the defendant herein in the Superior Court of the County of Sierra, State of California, for the purpose of recovering possession of the identical workings mentioned on page 2 of said Sizer affidavit and for damages for withholding the same; that said action is still pending in said Superior Court and said plaintiff has a complete and adequate remedy at law for the injuries complained of.

That a petition for rehearing and motion to vacate

the decree was made in the Equity suit pending before this Court and that the Judge thereof, the Honorable Frank H. Rudkin, denied both said petition for rehearing and said motion to set aside said decree, and the same was entered of record on June 1, 1918, and defendant in said action, the plaintiff in this, has had ever since said date in which to take an appeal and apply for supersedeas, and with reasonable diligence he could have done so.

That in pursuance of said decree above referred to and in accordance with its terms an injunction has issued out of this Honorable Court directed to the plaintiff herein and its agents, etc., enjoining them "from in any manner hindering or obstructing plaintiff (therein the defendant here) from working and mining said vein, etc." and that the object of this suit and the securing by this plaintiff of this restraining order is, as this affiant verily believes, to interfere with and hinder and obstruct and prevent this defendant from working and mining said vein, decreed to be its property as aforesaid and is an attempt to render said decree and said right to work said vein so awarded to this defendant, practically void and worthless.

S. B. CONNOR.

Subscribed and sworn to before me this 27th day of June, 1918.

[Seal] MARIE FORMAN,

Notary Public in and for the City and County of San Francisco, State of California.

THAT pursuant to adjournment the said order to show cause came on for hearing before this Court on

the 15th day of July, 1918, the application being based upon said complaint and the said affidavit of Frank L. Sizer; that upon the hearing of the matter, counsel for plaintiff, in response to an inquiry **[37—9]** from the court, stated that the sole question involved and presented for determination was whether in mining the Sixteen to One vein extralaterally underneath the surface of plaintiff's claims, the defendant was confined to working entirely within the walls of its vein or whether it had the right to cut into the country rock on either side of the vein, were necessary for its mining operations, either to keep its workings straight or regular, as is customary in such operations, where the vein undulates or changes in direction or where the vein narrows down to a width less than the convenient and ordinary width of the usual mining operations; plaintiff's contention being that the right of the plaintiff was confined to operations entirely within the walls of its vein and that those walls could not be transgressed, no matter how narrow the space. That upon this statement, the Court, without hearing from counsel for defendant, stated that it did not think the plaintiff's proposition could be sustained and that the application for a preliminary injunction would have to be denied; whereupon counsel for the defendant requested permission of the court to file affidavits in reply to the showing made by plaintiff in order that they might be used in the event that the plaintiff should appeal from the order denying the application, and permission to file the same was thereupon granted and the affidavits herein-

after set forth were thereupon filed by defendant, with leave to plaintiff within five days to file reply affidavit, should it be so advised. That thereupon the court caused to be entered its order denying said application, which order is in words and figures as follows:

(Title of Court and Cause.)

> "Plaintiff's application for a preliminary injunction came on to be heard and after argument being submitted and fully considered, it is ordered **[38—9½]** that said application be and the same is hereby denied";

To which ruling and order the plaintiff thereupon duly entered its exception.

The following are the affidavits filed on behalf of defendant, as above recited, to which no reply affidavits have been filed, viz.:

(Title of Court and Cause.)

(Venue.)

Affidavit of Thomas A. Gill.

Thomas A. Gill, being first duly sworn, deposes and says: that he is a resident of Nevada City, Nevada County, California, of the age of thirty-seven years, and a miner by occupation. That he has been actively engaged in mining for more than twenty-one years, as a miner, shift-boss, and for more than seven years last past as a general mine foreman. That for six years he has been and now is acting in the capacity of foreman for the North

Star Mines Company at the Champion Mine, Nevada City Mining District.

That he knows the Sixteen to One Mine at Alleghany, Sierra County, California, and has been over and through the works repeatedly and is familiar with the underground workings thereof. That he has noted that the main working shaft on said property is driven on the vein for a short distance and after crossing through faulted zone passes into the foot-wall and continues at a distance of from one to twenty feet under the vein at a constant grade or pitch and gradually flattening out in depth.

That in his opinion it was reasonably necessary to drive such shaft in the position in which it now is in reference to the vein. That it is of the utmost importance to keep the main working shaft of the mine on a constant grade or pitch and that it would be highly inadvisable and poor mining to **[39—10]** follow the broken and wavy course of the vein with the shaft which constitutes the main artery of the mine. That this practice is by no means uncommon in developing mines and it is often found necessary to depart even further than was done in this case.

Affiant further avers that he has seen instances of this practice in other mines throughout the state. That the shaft of the Empire Mines and Investment Company's mine at Grass Valley, California begins on the vein and is driven into the foot-wall in order to keep the shaft at a constant pitch. That another example may be seen in the Omaha Mine at Grass Valley, California where the main

working shaft departs from the vein and is driven into the foot-wall.

Affiant further avers that in his opinion it was advisable to pursue this course at the SIXTEEN-TO-ONE Mine. The vein has repeated faults, in every one of which the faulted segment is dropped into the foot-wall. That it is safer and cheaper to follow thru country rock at a short distance beneath the vein than to attempt to follow the undulations and faults of the vein.

Affiant further avers that he has noted the short cross cut into the hanging wall at the 300-foot level and the chute leading therefrom down to the main working shaft. That this chute was reasonably necessary to the working of the mine and that it is a common practice to cut such ore chutes for the purpose of storing and loading ore onto the skips in the shaft. That these chutes and ore pockets are found in every mine thruout the district cut into the hanging wall or the country rock.

That it is his opinion based on years of experience that the workings of the SIXTEEN-TO-ONE Mine cut into the country rock are reasonably necessary for the safe and efficient working of the said mine.

THOMAS A. GILL.

(Duly verified.)

(Title of Court and Cause.)

Affidavit of Elisha Hampton.

Elisha Hampton, being first duly sworn deposes and says: That he is a resident of Nevada City,

Nevada County, California, of the age of sixty-six (66) years, and a miner by occupation. That he has been actively engaged in mining for more than fifty years last past, and that for more than half of that time he has been engaged as an underground superintendent, general superintendent, or manager of mines. That he worked at the Federal Loan, Live Yankee, Brunswick and Summit Mines in Nevada County.

That he managed the Oneida and Bunker Hill Mines in Amador County for about thirteen years and that he was superintendent of the Seven Hundred Claim on Douglas Island for about two and one-half years. That he was general superintendent of the Goldfield Consolidated Mining Company at Goldfield, Nevada for two years. That practically all of his experience has been confined to quartz mining in deep mines.

That he has had experience in reading and interpreting maps and that he has seen a map of the underground workings of the SIXTEEN-TO-ONE Mine, situated at Alleghany, Sierra County, California. That he has noted that the main working shaft of said mine crosses thru a faulted zone on the vein and follows in the foot-wall thereof at a distance varying from one to twenty feet, beneath the vein. That said shaft maintains a constant pitch, gradually flattening out in depth. That there have been **[40—11]** raises driven thru to the vein at intervals.

Affiant avers that this course of driving a shaft into the foot-wall beneath the vein and following a course approximately parallel thereto is considered

good practice and commonly done in mining. That it is of the utmost importance to keep the main working shaft of a mine on a constant and uniform grade or pitch. That it is advisable to depart from the course of the vein when found necessary to keep the shaft straight. That this practice tends to efficiency and safety in extracting and removing the ore. That in this case it appears that the vein has faulted and broken and that in his opinion it would be dangerous and highly inadvisable to carry the main working shaft along the course of the vein. That where the vein is broken or where the country rock is softer but more uniform it is good mining practice to sink in the foot-wall. That affiant has seen many examples of this. The Onieda Original Shaft in Amador County started on the vein but when the vein flattened out in depth it was found advisable to drive the shaft into the foot-wall in order to maintain a constant pitch. That the Bunker Hill shaft in the same county was started on the vein but affiant deemed it advisable to drive into the foot-wall, gradually flattening out in depth.

That the shaft at the Fremont and at the Keystone, both in Amador County were likewise begun on the vein and then driven into the foot, gradually flattening out in depth.

Affiant avers that in his opinion it was highly advisable and necessary to drive the main working shaft of the SIXTEEN-TO-ONE Mine into the footwall as was done in this case and that such course is in accordance with the customs of good mining.

Affiant further avers that he noted a short cross

cut driven into the hanging wall at the three-hundred-foot level and a chute leading therefrom into the main working shaft of the SIXTEEN-TO-ONE. That he has been informed that such cross cut and chute is used for the purpose of storing and loading ore on to the skips in the shaft. That in his opinion it was necessary and advisable in this instance to make such an ore pocket and chute. That he has frequently found it necessary in carrying on mining operations to cut into the country rock for the purpose of obtaining storing and loading facilities. That such a practice is considered good mining and quite frequently resorted to. That it is advisable to have the chutes on sufficient grade or pitch so that the cars may be loaded by gravity and that where the pitch of the vein is flatter than 45° it is customary to cut into the hanging-wall and make the chute steeper. That in this instance it is his opinion that such an ore pocket and chute was reasonably necessary to the convenient and proper working of the mine in accordance with the customs of good mining.

ELISHA HAMPTON.

(Duly verified.)

(Title of Court and Cause.)

Counter-Affidavit of Andrew C. Lawson.

(Venue.)

Andrew C. Lawson, being first duly sworn, deposes and says: That he has been engaged in the study of geology and particularly economic geology

for upwards of 35 years last past, and has visited mines in various parts of the United States, Mexico, Canada, Alaska, Europe and Asia: that he is familiar with many of the gold quartz mines of the Sierra-Nevada; based on his observations made in these mines he states that it is common **[41—12]** mining practice to keep the various mine workings as straight as possible for economic reasons; that where a vein has undulations and rolls it would be impossible in many instances and highly impracticable from an economic standpoint to follow the vein with all its sinuosities and curvatures, and that it is almost invariable mining practice to follow along such a vein in a mean or average direction as nearly as possible. In addition to the actual openings on the vein itself, there are other openings which are reasonably necessary for operating purposes. A working run in the wall rock of a vein can usually be kept open with less expense because of the lesser amount of timbering required than a similar opening following the vein where the quartz is broken through so that the selvage or gouge of the vein is encountered, for this is usually a zone of weakness which requires additional support and for that reason is frequently not so satisfactory for a permanent working; where a vein is faulted, as is the case with the Sixteen to One vein with faults occurring at intervals, it is necessary in many instances to penetrate country rock in order to follow the faulted segment of the vein, and where the position of the vein upon each side of the fault is known, it is reasonable for the working to keep a mean position. That affiant is

familiar with the workings of the Sixteen to One Mine and with the main Sixteen to One Mine and with the main Sixteen to One shaft run immediately under the Sixteen to One vein throughout its lower extent, and also with the ore pocket and chute from the 300 ft. level, and in affiant's examination of other mines he has frequently found workings occupying a similar relation to the vein and that he considers the particular workings above referred to reasonably necessary for the operation of the Sixteen to One Mine from an economic standpoint and in entire accordance with the usuages and customs of modern mining as observed by him in other mines.

ANDREW C. LAWSON.

(Duly verified.)

(Title of Court and Cause.)

Counter-Affidavit of A. Werner Lawson.

(Venue.)

A. Werner Lawson being first duly sworn, deposes and says: that he is an economic geologist by profession, and has practiced his profession for several years last past and has visited mines in various parts of the western United States, with a view to studying and reporting on their economic development; that he has made an examination of the Sixteen to One Mine workings, situated in Sierra County, California. That the Sixteen to One vein, both on strike and dip, has many minor rolls and variation in directions and also varies greatly in width in various parts of the mine, and there is faulting in

places so that it would be a practicable impossibility as well as a great economic disadvantage to follow the vein in all its variations and changes in course and dip with the main working through which ore and waste has to be raised or conveyed on a track and in the lowering of timbers; that it is the invariable custom in economic mining to keep these major workings, especially the main working shaft of a mine following as straight and direct a course as is possible consistent with the position of the vein. It is a common mining practice to drive workings, especially permanent workings, immediately above or below the vein, especially where the country rock is hard and will stand without much timbering. It is also a universal mining custom to cut ore pockets, chutes, stations and other incidental **[42—13]** workings, into the country rock away from the vein for the purpose of working the mine in a practical and economic manner. Affiant is familiar with the ore pocket and chute run out from the 300 level in the Sixteen to One mine, and in affiant's opinion this working was run in accordance with common mining practice and is reasonably necessary for the economic and profitable operation of the mine. The same is true of the lower end of the main working shaft which is underneath the Valentine surface, and which is 10 or 15 feet below the vein. In the opinion of affiant the position of the shaft immediately below the vein is in accordance with good mining practice in view of the fact that the ore from the vein can be loaded through the chutes opening into the shaft directly into the skips by gravity, and

also for the purpose of keeping the shaft running in a more uniform grade. That these workings last mentioned are run in barren country rock and in affiant's opinion cannot occasion any possible financial injury to the surface owner of the Belmont and Valentine claims. And, on the other hand, if the Sixteen to One Company will be prevented from using such workings will result in great hardship and inconvenience and financial loss.

A. WERNER LAWSON.

(Duly verified.)

(Title of Court and Cause.)

Affidavit of M. C. Sullivan.

(Venue.)

M. C. Sullivan, being first duly sworn, deposes and says: that he is and has been for upwards of three years last past superintendent of the Sixteen to One Mine; that the ore chute underneath the Belmont surface and the lower extension of the Sixteen to One shaft underneath the Valentine surface were run under his direction; that said ore pocket and chute was constructed for the purpose of handling the ore extracted from the Sixteen to One vein in a reasonable and economic manner; that it is common mining practice to cut such ore chutes and pockets and other workings, such as stations in the immediate vicinity of the vein, and that said shaft below the Valentine surface was run beneath the vein in order to keep the shaft, which is the main working shaft

of the Sixteen to One Mine, as nearly straight as possible, and the departure from the vein to the slight extent there shown was for the purpose of getting into the solid wall rock immediately underneath the vein so that it will require less timbering and would stand better as a permanent working; the vein above in the upper workings had been faulted several times, the lower segment being dropped down each time, and this was an additional inducement for keeping under the vein, so that if it were faulted again in a similar manner this main working shaft through which all the hoisting operations would have to be performed would keep as near an average course as possible; in running said workings on and in the immediate vicinity of said vein, this affiant as superintendent has used the utmost good faith in trying to confine his operations as near to the vein itself as is reasonably practicable and possible; that no ore of any character has been encountered in any of said workings off the vein, but said workings have been run entirely in worthless and waste country rock, and cannot possibly have caused any detriment or damage or loss whatsoever to the owners of the surface of the Belmont and Valentine claims; that the workings above referred to are reasonably necessary in carrying on the mining operations on the Sixteen to One vein and are in accordance with common mining practice, and to confine such **[43—14]** workings to the vein itself would be a practicable impossibility and would seriously hamper the mining operations and cause an economic loss which would

be a great disadvantage to the Sixteen to One Company.

M. C. SULLIVAN.

(Duly verified.)

(Title of Court and Cause.)

(Venue.)

Affidavit of W. L. Williamson.

W. L. Williamson, being first duly sworn, deposes and says: That he is a resident of Nevada City, Nevada County, California, and a miner by occupation. That he has been engaged in mining for more than thirty years last past, and for more than fifteen years last past has been acting in the capacity of general foreman, underground superintendent, and general superintendent, of various mines throughout the States of California, Nevada, Arizona and Washington. That during such time he has had a continual experience with the operation, maintenance and exploitation of quartz mining in all its branches, and particularly with the underground workings thereof. That it has been part of his business to sink shafts, repair, and maintain the same. That he has engaged in such work at the Gaston Gold Mining Company's mine, at Gaston, Nevada County, California, as superintendent for more than four years and as underground superintendent for more than seven years. That he worked in a similar capacity in the Eureka Mine, Mohave County, Arizona, for several years, and at the Eureka Mine, Whatcom County, Washington, for about sixteen months. That at present he is acting as

superintendent for the Grass Valley Consolidated Gold Mining Company in operating the Allison Ranch Mine, Grass Valley, California.

Affiant further avers that he is familiar with map-reading, and has had a great deal of experience in that work. That he has examined a map of the underground workings of the Sixteen to One Mine, Alleghany Mining District, Sierra County, California, and has seen a representation of the position and extent of the main working shaft or winze of said mine, and has noted its relation to the vein throughout its entire length. That it appears from said map that the shaft has been driven underneath the vein at various places to a depth or distance from the latter varying from one to twenty feet. That raises have been driven at several places to connect with the vein and the stopes thereon. That the shaft maintains a constant grade or pitch, flattening out gradually in depth, while the vein appears to be irregular in its course, with undulations and frequent faulting. That the lower segments of said faulted vein appear to have dropped into the foot wall in several instances. In this connection, affiant avers that in his opinion based on years of experience in mining, it was not only advisable, but reasonable necessary to sink the shaft as has been done in this case. That it would be poor mining to confine the shaft to the walls of the vein, and not in accordance with the customs of mining in depth. That it is of the utmost importance to construct and maintain the main working shaft of a mine in manner as direct as possible, and with few variations in grade. It is im-

possible to extract and remove the ore with safety of efficiency where the main shaft follows the irregularities of the vein.

That in his experience he has found that it is not an unusual practice to follow this plan when the circumstances [44—15] require it. That affiant had occasion to follow an exactly similar plan at the Eureka Mine in Mohave County, Arizona, where the main working shaft was cut in to the foot wall at his direction, for the purpose of maintaining a constant grade. That the Allison Ranch Mine, Grass Valley, California, is operated through a shaft which begins on the west vein and cuts into the hanging wall in order to avoid the undulation of the vein.

Affiant further avers that such practice is further advisable where the foot wall of the vein is of softer material than the vein so that it may be mined more cheaply, or where the vein is irregular, faulted, and broken making it dangerous and difficult to keep open.

Affiant further avers that he has noted the ore pockets and chutes cut into the country rock, in immediate proximity of the vein and that it is his opinion that such work was and is reasonably necessary to facilitate the extraction of ore in accordance with the customs of good mining. That where the vein is small it is frequently necessary to cut into the foot wall to obtain sufficient room for storage and loading ore on to the skips, and that it is advisable and customary to make such cuts underneath the vein so that the loading may be done by gravity.

W. L. WILLIAMSON.

(Duly verified.)

(Title of Court and Cause.)

Counter-Affidavit of N. S. Kelsey.

(Venue.)

N. S. Kelsey, being first duly sworn, deposes and says: That he has for several years been connected with the management of the operations in the Argonaut Mine of Amador County, State of California, and is now the manager thereof; that he is familiar with other gold mines in the Sierras, State of California, and it is common mining practice to run the various workings of a mine, and particularly the shaft so as far as possible to strike a mean or average and keep the workings continuing as straight as possible for economic reasons; that if the shaft or other workings of a mine were to follow all the undulations and variations of the vein, the mine could not be worked practically, nor profitably, and that it is considered proper and ordinary mining to cut into the walls of the vein, especially where the vein is a narrow one, for the purpose of constructing ore pockets and chutes and stations; that such work can do no injury to the surface owner if it be in country rock and confined to the immediate vicinity of the vein; that the main shaft of the Argonaut Mine is some 4000 feet in depth on the incline, and in order to strike an average and avoid prohibitive expense it has been necessary to depart quite materially from the main vein in the lower portion of the shaft in passing underneath the surface of other mining claims and property which were at

the time of sinking such shaft in the ownership of other persons.

Affiant further states that he has examined a copy of the plat attached hereto, being a cross-section through the Sixteen to One shaft, and noted the ore pocket and chute extending from the 300 foot level underneath the surface of the Belmont claim and also the lower extension of the shaft underneath the Valentine claim and in his opinion as a practical mine manager the workings specified do not constitute an unreasonable departure from the vein which is colored in red on the attached plat, but are run in accordance with the common mining practice as aforesaid.

N. S. KELSEY.

(Duly verified.) **[45—16]**

IT IS HEREBY stipulated that the foregoing bill of exceptions and amendments may be approved, settled and signed by the Judge of said court as a true and correct bill of exceptions upon the hearing of said application for an injunction.

Dated this 12th day of August, 1918.

FRANK R. WEHE,
BERT SCHLESSINGER,
JNO. B. CLAYBERG,
Attorneys for Plaintiffs.
WM. E. COLBY,
JOHN S. PARTRIDGE,
GRANT H. SMITH,
CARROLL SEARLS,
Attorneys for Defendants.

Order Approving etc. Bill of Exceptions.

The above and foregoing bill of exceptions or statement, is hereby approved, settled and signed as a true and correct bill of exceptions in behalf of plaintiff upon its application for a preliminary injunction.

Dated this 13 day of August, 1918.

FRANK H. RUDKIN,
Judge. [46]

Receipt of a copy of within statement admitted July 24, 1918.

WM. E. COLBY,
Attorney for Defendant.

[Endorsed]: Filed Aug. 13, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[48]**

[Title of Court and Cause.]

Petition for Allowance of Appeal.

The above-named plaintiff Twenty One Mining Company considering itself aggrieved by the order made and entered by the above-named court in the above-entitled action on July 15th, 1918, wherein and whereby the above-entitled court denied the above plaintiff's application for the issuance of a preliminary injunction does hereby present this petition for the allowance of an appeal to the United States Circuit Court of Appeals, Ninth Circuit from said order, for the reasons set forth in the assignment of errors which was filed herewith; and prays that this petition for said appeal may be allowed and entered by this Court and transcript thereof together with all papers duly authenticated may be sent to the United States Circuit Court of Appeals, Ninth Circuit.

FRANK R. WEHE,
BERT SCHLESSINGER,
JNO. B. CLAYBERG,
Attorneys for Petitioner.

Appeal allowed and cost bond fixed at $300.00.

WM. C. VAN FLEET,
Judge.

Service of within Petition admitted 13th August, 1918.

WM. E. COLBY,
Atty. for Deft.

[Endorsed]: Filed Aug. 13, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[49]**

[Title of Court and Cause.]

Assignment of Errors.

Now comes the plaintiff Twenty-One Mining Company and files the following assignment of errors upon which it will rely in its appeal from an order made in the above-entitled court on the 15th day of July, 1918, refusing to issue a preliminary injunction therein in favor of the above-named plaintiff and against the above-named defendant.

(1) The Court erred in refusing said injunction because the plaintiff, by the ownership of the surface of its mining locations, under which a vein dips extralaterally from the apex in adjoining ground, is given the right and title to each and every part of said mining claims including the surface thereof and everything beneath the surface, except veins which apex outside of such surface boundaries.

(2) The Court erred in refusing said injunction because the statutes of the United States only give to one pursuing a vein extralaterally of which the apex is within his ground, the right to follow said vein on its dip under the property or mining locations of any other person.

(3) The Court erred in refusing said injunction because the Act of Congress gives no right to the owner of any mining claim which includes the apex of a vein, to enter upon [50] the mining claim of another under which said vein dips extralaterally, either on or underneath the surface, or to remove any rock, earth or other part or portion of said mining claim.

(4) The Court erred in refusing said injunction because any act of defendant in going outside of the boundaries or limits of said vein extralaterally amounts to an invasion of the rights of plaintiff in and to its said mining claims.

(5) The Court erred in refusing said injunction because under the Act of Congress when plaintiff became the locator or holder of mining claims it owned everything beneath the surface of said claims, except such vein or veins lying thereunder, which apex outside of the surface boundaries of such claims.

(6) The Court erred in refusing said injunction because the Acts of Congress do not declare any exception of any property or right in a mining claim except the right, title and possession to veins lying underneath the surface boundaries thereof which apex outside of such mining claim.

(7) The Court erred in refusing said injunction because under the Acts of Congress the title to a mining location vests in the locator or holder thereof everything beneath the surface of such claims except only veins lying underneath said surface which apex outside of the surface boundaries of said claim.

(8) The Court erred in refusing said injunction because no right is given by the statutes of the United States, to the owner of the apex of any vein, to go outside of the boundaries or limits of such vein in the development, working or operation thereof at any point outside the surface boundaries of the claim in which said vein apexes dropped downward perpendicularly. **[51]**

(9) The Court erred in refusing said injunction because under the Acts of Congress the rights given thereby cannot be extended by construction to include anything except rights clearly given.

(10) The Court erred in refusing said injunction because there cannot be imported into the said Acts of Congress, a grant or the intent to grant any right aside from such rights as are therein specifically mentioned.

(11) The Court erred in refusing said injunction because the exercise of any acts or rights by the owner of the apex of the vein, while pursuing the same extralaterally under the surface of the property or locations owned by others, by which the property or rights of such other owner are interfered with or invaded, is the taking of private property without payment of due compensation in violation of the Constitution of the United States.

(12) The Court erred in refusing the said injunction because the going outside of the boundaries of the vein by working, developing or mining said vein extralaterally within the boundaries of property owned by a third person, is an invasion of the property and rights of such third person, and such third

person need not show any damages to prevent said invasion, other than those presumptively arising from the invasion of their rights.

(13) The Court erred in refusing the said injunction because it is alleged in the complaint on file herein and the affidavit of Frank L. Sizer filed in support of said complaint for the purposes of obtaining an injunction, that the defendant herein, will in the mining, development or working of said vein extralaterally and beneath the plaintiff's locations, go outside of the vein and make and create large excavations in the country [52] rock and earth beneath the surface of such location and thereby directly invade the property and rights of the plaintiff, and these allegations are not denied.

(14) The Court erred in refusing said injunction because it appears from the affidavits, pleadings and other papers filed herein that said defendant does not deny that it intends to go outside of the boundaries or limits of said vein while developing, working or mining the same extralaterally at points beneath the surface of plaintiff's locations, and make large excavations in the country rock belonging to plaintiff and lying underneath the surface of the said locations.

(15) The Court erred in refusing the injunction because in defendant's verified answer filed herein prior to said hearing, it is alleged that said defendant intends in the future working, development and mining of said vein under plaintiff's said mining locations to excavate and remove any and all rock and earth outside of the boundaries or limits of said vein

as may be reasonably necessary to the profitable and economical working of said vein.

(16) The Court erred in refusing the injunction because the defendant in its verified answer filed herein prior to said hearing alleges and claims that it has the absolute right to go outside of the boundaries or limits of said vein and excavate and remove whatever amount of country rock may be reasonably necessary or convenient to render profitable and economical the working, development and mining of said vein.

(17) The Court erred in refusing the said injunction because it appears from the pleadings and affidavits on file herein that the defendant intends in the future working, development and mining of said vein extralaterally, to go outside of and [53] beyond the walls and boundaries of said vein and excavate and remove rock and earth from the mining claims owned by plaintiff.

(18) The Court erred in refusing the said injunction because it appears from the pleadings and affidavits on file herein that defendant claims the right in working, development or mining of said vein extralaterally, to go outside of and beyond the boundaries and walls of said vein whenever and wherever it becomes convenient or necessary so to do for the purpose of profitably or economically mining, working or developing said vein.

(19) The Court erred in refusing said injunction because it appears from the pleadings and affidavits on file herein that defendant had theretofore made excavations and removed large quantities of rock

and earth from beneath the surface of plaintiff's mining claims, and had constructed and excavated extensive shafts, tunnels, cross-cuts and other workings, entirely away from and disconnected with said vein, and did not deny that it would do the same in the future if it was considered convenient and reasonably necessary to the profitable and economical working, development or mining of said vein.

(20) The Court erred in refusing said injunction because it appears from the pleadings and affidavits filed herein that the said defendant had theretofore excavated and removed large quantities of rock and earth from beneath the surface of plaintiff's said mining claims and had constructed and excavated extensive shafts, tunnels, cross-cuts and other workings entirely away from and disconnected with said vein and claimed that it had the legal right so to do.

(21) The Court erred in refusing said injunction because it appears from the pleadings and affidavits on file herein on behalf of plaintiff that defendant will in the future working, development [54] and mining of said vein extralaterally, not keep such working, development and mining within the boundaries thereof, but will go beyond and outside of said boundaries and extract and remove large quantities of earth and rock from underneath the surface of plaintiff's mining claim.

(22) The Court erred in refusing said injunction because it appears from the pleadings and affidavits on file herein that defendant claims the right to go outside of said vein and extract and remove all the

earth and rock underneath the surface of plaintiff's mining claim which it may consider to be reasonably necessary or convenient to the profitable and economical mining, working and development of said vein.

(23) The Court erred in refusing said injunction because the performance of the acts contemplated by defendant in the working and mining and development of said vein extralaterally, will invade plaintiff's rights and ownership to said mining claims so owned by it, which are guaranteed to plaintiff by the Statutes of the United States.

WHEREFORE, plaintiff insists that said order of said Court should be reversed and that said District Court for the Northern District of California, Second Division, may be directed to enter an order granting the issuance of said preliminary injunction in accordance with the application of plaintiff in that behalf and that plaintiff have such other and further relief as it may be entitled to in accordance with the law.

Dated this 12th day of August, 1918.

FRANK R. WEHE,
BERT SCHLESSINGER,
JNO. B. CLAYBERG,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 12, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[55]**

30779–18

THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

Capital Paid in Cash $1,700.000. Total Resources over $3,000,000.
Home Office:
BALTIMORE, MD.

In the District Court of the United States in and for the Northern District of California, Second Division.

TWENTY ONE MINING COMPANY, a Corporation,

Plaintiff,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INCORPORATED, a Corporation,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Twenty One Mining Company, a corporation, as principal, and the United States Fidelity & Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and having its principal place of business in the city of Baltimore, Maryland, as surety, are held and firmly bound unto the above-named Original Sixteen to One Mine, Inc., a corporation, in the sum of Three Hundred Dollars, to be paid to

the said Original Sixteen to One Mine, Inc., a corporation, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents;

SEALED with our seals and dated the 10th day of August, 1918;

WHEREAS, the above-named Twenty One Mining Company, a corporation, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the order dated July 15th 1918, rendered in the above-entitled suit, in the District Court of the United States for the Northern District of California, [56] Second Division;

NOW, THEREFORE, the condition of this obligation is such, that if the above-named Twenty One Mining Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

TWENTY ONE MINING CO.,
By L. A. MAISON,
Secretary.

UNITED STATES FIDELITY & GUARANTY COMPANY,
(Seal of U. S. Fid. & Guar. Co.)
By H. V. D. JOHNS,
By JAS. M. KENNEY,
Attorneys in Fact.

Approved:

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed August 12, 1918. Walter B. Maling, Clerk. [57]

(Title of Court and Cause.)

Praecipe for Transcript of Record on Appeal.

To the Clerk of the Above-entitled Court:

You are hereby directed to make and prepare the record on appeal in the above-entitled cause from the order heretofore made and entered on July 15th, 1918, denying the application of plaintiff to issue a preliminary injunction in said cause, etc., and have the same in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, on the 11th day of September, 1918.

In preparing said transcript, it shall be made up of the following papers, to wit:

Bill of complaint,

Answer of defendant,

Plaintiff's bill of exceptions,

Assignment of errors,

Petition for allowance of appeal and allowance,

Citation on appeal,

Bond on appeal and approval,

Praecipe for transcript,

Certificate of clerk.

Dated this 21st day of August, 1918.

JNO. B. CLAYBERG,
FRANK R. WEHE,
BERT SCHLESINGER,
Attorneys for Plaintiff.

IT IS HEREBY STIPULATED AND AGREED, that the above and foregoing papers may constitute the transcript on plaintiff's appeal from the order of the Court denying its application for a preliminary injunction.

Dated August 21st, 1918.

JNO. B. CLAYBERG,
FRANK R. WEHE, [58]
BERT SCHLESINGER,
Attorneys for Plaintiff.
WM. E. COLBY,
JOHN S. PARTRIDGE,
GRANT H. SMITH,
CARROLL SEARLS,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 2, 1918. W. B. Maling, Clerk. J. A. Schaertzer, Deputy Clerk. [59]

[Title of Court and Cause.]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, WALTER B. MALING, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing fifty-nine (59) pages, numbered from 1 to 59,

inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $34.80; that said amount was paid by the attorneys for the plaintiff; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 24th day of August, A. D. 1918.

[Seal] WALTER B. MALING,

Clerk United States District Court, for the Northern District of California.

By J. A. Schaertzer,

Deputy Clerk. [60]

[Title of Court and Cause.]

United States of America,
Northern District of California,—ss.

Citation on Appeal.

The President of the United States of America, to Original Sixteen to One Mine, Inc., Defendant:

You are hereby cited and admonished to appear and be at the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof pursuant to an order allowing an appeal made and en-

tered in the above-entitled action in which the Twenty One Mining Company is plaintiff and appellant and the Original Sixteen to One Mine, Inc., is defendant and appellee in said appeal, to show cause, if any there be, why the interlocutory order made and entered in said cause on the 15th day of July, 1918, refusing the issuance of a preliminary injunction in favor of the above-named plaintiff and appellant restraining the above-named defendant and appellee pending the suit, from excavating or removing any part of rock or earth beneath the surface of the Valentine and the Belmont Quartz Lode mining claims, in the working, development or mining extralaterally of a vein lying underneath the surface of said mining claims and apexing outside of said claims and in a claim belonging to said defendant [61] and appellee, should not be set aside, corrected and remised and why speedy justice should be done to the plaintiff the Twenty One Mining Company.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 12th day of August, 1918.

WM. C. VAN FLEET,
Judge. [62]

[Endorsed]: Eq. 410. United States Circuit Court of Appeals, Ninth Circuit. Twenty One Mining Company, a Corporation, Appellant, vs. Original Sixteen to One Mine, Inc., a Corporation, Appellee. Citation. Service of Within Citation Admitted August 13th, 1918. Wm. E. Colby, Attorney for Defendant.

Filed Aug. 13, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3205. United States Circuit Court of Appeals for the Ninth Circuit. Twenty One Mining Company, a Corporation, Appellant, vs. Original Sixteen to One Mine, Inc., a Corporation, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed August 27, 1918.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

[Title of Court and Cause.]

Stipulation Re Printing of Record.

IT IS HEREBY STIPULATED AND AGREED that in the printing of the record herein for the consideration of the court on appeal from the order denying plaintiff's application for a preliminary injunction, heretofore entered in the above-entitled cause, the title of the court and cause in full on all the pages shall be omitted except on the first page, and inserted in lieu thereof, "Title of Court and Cause"; that no verification included in

the record need be printed in full, but there be inserted in lieu thereof, "Duly verified."

All that part of defendant's answer commencing line 2, page 7 with the words, "By way of a further and separate answer to said complaint, defendant alleges:" down to and including the words, "at the trial thereof and testimony introduced directed thereto," lines 13 and 14 of page 19 of said Answer, shall be omitted from the printing of said record, because the same and the whole thereof, has been stricken out by order of the Court below.

Dated August 24th, 1918.

JNO. B. CLAYBERG,
FRANK R. WEHE,
BERT SCHLESSINGER,
Attorneys for Plaintiff.
WM. E. COLBY,
JOHN S. PARTRIDGE,
GRANT H. SMITH,
CARROLL SEARLS,
Attorneys for Defendant.

[Endorsed]: No. 3205. In the United States Circuit Court of Appeals, Ninth Circuit. Twenty One Mining Company, a Corporation, Plaintiff and Appellant, vs. Original Sixteen to One Mine, Inc., a Corporation, Defendant and Appellee. Stipulation Re Printing of Record. Filed Aug. 27, 1918. F. D. Monckton, Clerk.

No. 3205

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TWENTY ONE MINING COMPANY
(a corporation),
Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INC.
(a corporation),
Appellee.

BRIEF FOR APPELLANT.

JOHN B. CLAYBERG,
FRANK R. WEHE,
BERT SCHLESINGER,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO.

terms of such decree, the appellee claims the right to develop, work and mine said vein at any and all points underneath the surface of the Belmont and Valentine mining claims, and intends so to do, and to commence such work immediately; that in the development, working and mining thereof, appellee will excavate and remove large quantities of rock and earth outside of said vein, and make large openings underneath the surface of said mining claims entirely outside of the limits and boundaries of said vein; that unless restrained, appellee will enter upon said claims underneath the surface thereof at points outside the limits or boundaries of said vein, and will take out, excavate and remove large quantities of earth and rock which are now the substance of said claims, and that appellant has no plain, speedy and adequate remedy at law. Appellant prays for a preliminary injunction which it asks to be made perpetual, upon the final hearing of the case (Record pages 1-7).

In support of the application for such injunction, appellant filed with said complaint the affidavit of one Frank L. Sizer, which after stating his familiarity with the premises in controversy, rehearses the existence of the vein as alleged in the complaint, and then sets forth that it appears by the workings on said vein formerly done by appellee underneath the Valentine and Belmont mining claims, that appellee has, in many instances, gone entirely outside and beyond the vein, and made large excavations under the surface of

these claims, which are then set forth particularly. The affidavit then sets forth that the vice-president of the appellee had theretofore filed an affidavit in the federal court in other litigation between the parties to this suit, stating that he had great experience in the development and operation of mines, and that it is a universal custom in following a vein, either horizontally or on the dip, to drive such workings on a more or less straight course, rather than to follow the undulations and rolls of the vein, so long as the workings keep in close touch therewith; that it would be a practicable and economical impossibility to follow all the sinuosities of the vein by keeping the working entirely within the vein, in case of sinking an incline shaft; that in sinking such shaft, nearly a straight course must be followed in order to make the shaft available; that where the general course of the vein changes abruptly, a change in the direction of the shaft then naturally follows, in order to keep in close touch with the vein; that in sinking the Sixteen to One shaft, the departure of the shaft from the vein was not greater than would be justified in economical and practicable mining.

Mr. Sizer's affidavit then sets forth statements in a like affidavit of one William D. Simkins, covering the same matters as included in the affidavit last above mentioned. Mr. Sizer then says that if the appellee follows the practice in which it had theretofore been engaged, wherever there is an undulation or wave in the vein, it will depart from

the vein and excavate its working entirely outside thereof and in the country rock, which is a portion of the substance of the Belmont and Valentine claims; that appellee, in a verified answer filed by it, in a certain action in ejectment, now pending in Sierra County, California, admits that it made all the excavations claimed by Mr. Sizer, and alleges that it had a right so to do, except as to a certain cross-cut 230 feet long, and 4x6 feet in size; that such excavations were made for the sole purpose of following the vein lying underneath the mining claims above mentioned, and to mine and remove the ore in the same to the surface, and that it was necessary and incident to a profitable and beneficial working of the vein to make such excavations (Record pages 17 to 24).

Thereafter, appellee filed its verified answer herein in which it is alleged that it is now engaged in working and mining said vein. It admits that appellee, in the future mining of said vein, intends to go outside the boundaries thereof, whenever and wherever necessary *"for the profitable and economical mining of the vein"* and asserts its rights so to do as incident to the ownership of the vein (Record pages 9 to 15).

Appellee filed with said verified answer, the affidavit of its vice-president, which sets forth practically the same facts (Record pages 27-32).

After the denial of appellant's motion for the injunction in the court below, appellee was given the privilege of filing certain other affidavits, which

are found in the record on pages 34 to 49 inclusive. These affidavits, in our judgment, except as hereinafter stated, are unimportant, because each and every one of them simply refer to and endeavor to justify the making of excavations by appellee before the institution of this suit, and which are involved in the action in ejectment in Sierra County, as above specified. It is however, important to notice that in none of the affidavits filed in behalf of the appellee, is there anything to show that the common practice of going outside the boundaries of the vein in certain instances, *was at points extralaterally on the vein beneath the surface of claims owned by third persons.*

We desire to call the attention of the court to the fact that nowhere in defendant's answer or affidavits, is it claimed or asserted by appellee that at any point on the vein underneath the surface of plaintiff's mining claims, will it be *necessary* for defendant to go outside the boundary of the vein, in pursuing it to its utmost depth. All that is claimed or asserted in behalf of appellee's right to go outside the vein, is that by so doing, it will be enabled to follow and work the vein more "*profitably and economically*".

The answer and affidavits were adroitly drawn, and apparently so for the purpose of avoiding any direct allegation that it would be absolutely necessary in order to pursue the vein, to go outside thereof in some instance, and of leaving the inference that such necessity exists.

We desire to call the court's attention to paragraph X of the answer, which is as follows:

> "Defendant admits that if it be compelled to follow *all the sinuosities, curvatures and variations of said vein, and construct its work accordingly, and be compelled to depart from the running of straight workings, such as are customary, proper and reasonable in the conduct of mining operations, that it could not work said vein without the expenditure of large amounts of money which will be necessary to perform said mining and work within the straight and technical limits of the wall boundaries of said vein.*"

In paragraph XI of said answer, we find the following:

> "That it intends to remove such small quantities of barren and worthless country rock in the immediate vicinity of said vein in the walls thereof, *as may be necessary for the profitable and economical working of said vein*, and as may be reasonably necessary for such purposes, in accordance with the customs and usages of the art and science of mining under similar circumstances."

Aside from general denials of intention to work outside the vein, the above are all the allegations of the answer which bear upon the question now under consideration.

In the affidavit of S. B. Connor, it is stated:

> "That this defendant has no intention and will not depart from said vein in the prosecution of its work at any greater extent than herein specified, and with the utmost good faith, it has every intention of confining its working in the future *as closely as possible to*

> *the vein consistent with economical and profitable mining,* and in accordance with the usages and customs of the art and science of mining" (Record page 30).

In the affidavit of Thos. A. Gill, we find the following:

> "That it is of the utmost importance to keep the main working shaft of the mine on a constant grade or pitch, and that it would be *highly inadvisable and poor mining* to follow the broken and wavy course of the vein with the shaft, which constitutes the main artery of the mine" (Record page 35).

And again:

> "That it is *safer* and *cheaper* to follow through country rock at a short distance beneath the vein, than to attempt to follow the undulations and faults of the vein" (Record page 36).

In the affidavit of Elisha Hampton, we find the following:

> "That it is of the utmost importance to keep the main working shaft of the mine on a constant uniform grade or pitch; that it is advisable to depart from the course of the vein when found necessary to keep the shaft straight; that this practice *tends to efficiency and safety* in extracting and removing the ore; that in this case, it appears that the vein has faulted and broken, and that in his opinion, it would be *dangerous and highly inadvisable* to carry the main working shaft along the course of the vein; that where the vein is broken or where the country rock is softer, but more uniform, it is *good mining practice* to sink in the foot wall" (Record pages 37-8).

In the affidavit of Andrew C. Lawson, we find the following:

> "Based on his observations made in these mines (referring to mines in various countries) he states that it is common mining practice to keep the various mine workings as straight as possible *for economic reasons;* that where a vein has undulations and rolls it would be impossible in many instances and *highly impracticable from an economical standpoint to follow the vein with all its sinuosities and curvatures,* and that it is almost invariable mining practice to follow along such a vein in a mean or average direction as nearly as possible. In addition to the actual openings on the vein itself, there are other openings which are reasonably necessary for operating purposes. *A working run in the wall rock of a vein can usually be kept open with less expense because of the lesser amount of timbering required, than a similar opening following the vein where the quartz is broken through so that the selvage or gouge of the vein is encountered, for this is usually a zone of weakness, which requires additional support, and for that reason is frequently not so satisfactory for a permanent working*" (Record page 40).

In the affidavit of A. Werner Lawson, we find the following:

> "That the Sixteen to One vein both on its strike and dip, has many minor rolls and variations in direction, and also varies greatly in width in various parts of the mine, and there is faulting in places so that it would be a practical impossibility as well as a *great economical disadvantage* to follow the vein in all its variations and changes in course and dip with the main workings through which ore and waste has to be raised or conveyed on a track, and in the lowering of timber" (Record pages 41-2).

And further:

> "It is common mining practice to drive workings, especially permanent workings *immediately above or below the vein,* especially *where the country rock is hard,* and will stand without much timber" (Record page 42).

In the affidavit of M. C. Sullivan, after stating that it is common mining practice to cut ore chutes, pockets and other workings such as stations, in the immediate vicinity of the vein, says:

> "The departure from the vein to the slight extent there shown, was for the purpose of getting into the solid wall rock immediately underneath the vein *so that it will require less timbering,* and would *stand better as a permanent working*" (Record page 44).

And again:

> "To confine such workings to the vein itself, would be a practicable impossibility, and would *seriously hamper mining operations and cause an economical loss* which would be a great disadvantage to the Sixteen to One Company" (Record page 44).

In the affidavit of W. L. Williamson, we find the following:

> "That it would be poor mining to confine the shaft to the walls of the vein, and not in accordance with the customs of mining in depth; that it is of the utmost importance to construct and maintain the working shaft of a mine in a manner as direct as possible, and with few variations in grade. It is impossible to extract and remove the ore with *safety or efficiency* where the main shaft follows the irregularities of the vein" (Record pages 46-47).

And again:

> "Affiant further avers that such practice is further advisable where the foot wall of the vein is of softer material than the vein so that *it may be mined more cheaply,* or where the vein is irregular, faulted and broken, making it *dangerous and difficult to keep open.* * * *
>
> That where the vein is small, it is frequently necessary to cut into the foot wall to *obtain sufficient room and storage for loading ore onto the skips,* and that it is advisable and customary to make such cuts *underneath* the vein so that the loading may be done by gravity" (Record page 47).

In the affidavit of N. S. Kelsey, we find the following:

> "It is the common mining practice to run various workings of a mine, and particularly the shaft, so far as possible to strike a mean or average direction, and keep the workings continuing as straight as possible, *for economic reasons;* that if the shaft or other workings of a mine were to follow all the undulations and variations of the vein, the mine could not be worked *practically nor profitably,* and that it is considered proper and ordinary mining, to cut into the walls of a vein, especially where the vein is a narrow one, for the purpose of constructing ore pockets, chutes and stations" (Record page 48).

The court can readily see from the above quotations that appellee does not contest the right to the injunction on the ground that by its issuance, the working and mining of the vein underneath appellant's claims, will be prevented, because conditions in the vein render it impossible of working or mining without going outside its boundaries, but

contests its issuance on the ground only, that the vein can be worked more *"profitably and economically"* by going outside its boundaries in certain instances.

It is difficult to comprehend any equitable principle which would authorize a trespass upon, and invasion of appellant's property, simply because it would save money for appellee or render its vein more valuable.

Specification of Errors Relied Upon.

(1) The court erred in denying the preliminary injunction applied for by appellant.

(2) The court erred in making and entering the order of July 15th, 1918, denying a preliminary injunction against appellee as applied for by appellant (Record page 34).

The basis of these specifications of error may be found in appellant's assignment of errors (Record pages 54-60) all of which have been charged for the single purpose of raising the principal question on which we shall hereafter present our argument.

Argument.

It appears from the above statement of the case that there is practically no dispute as to the facts involved, and the question which is put clearly before the court for decision is:

HAS ONE, RIGHTFULLY FOLLOWING A VEIN EXTRALATERALLY BENEATH THE SURFACE OF CLAIMS OWNED BY ANOTHER, THE RIGHT TO GO OUTSIDE OF THE BOUNDARIES OF THE VEIN IN THE PROSECUTION OF HIS WORK.

We shall preface the argument with the following well-settled principles which should be borne in mind in the consideration and decision of the proposition involved:

1. A vein extralaterally belongs to and is a part of the location in which the apex thereof is situated.

2. By a valid location, a locator conditionally secures each and every right which would pass to him by a patent of the ground, except the bare legal title, which the government holds in trust for him, until patent is issued. It may be questionable whether a location can, under any circumstances, be considered a grant, because the term "grant" includes in its meaning passage of the full legal title. The full legal title to a mining claim does not pass until the patent is issued. It seems to be generally understood, however, that by a location one is given the permission to exclusively occupy, use and enjoy everything included in the location, and that this is a possessory right only, which cannot be taken away, even by the government, if the locator complies with the statute in performing the annual representation work. As to all third persons, of course, the rights given by a

location are tantamount to the rights given by a patent.

We also deem it important that we first present our views on certain other propositions which may or may not be contested. Such propositions are four in number, viz:

A. Wherever a legal right is about to be tortiously invaded, the owner thereof, in an application for its protection, need neither allege nor prove actual damages.

B. Where a legal right is sought to be protected by injunction against a tortious invasion, if the court below denies such injunction *as a matter of law,* the discretion of that court is not involved or exercised, and this court on appeal must determine whether the decision of the court below was erroneous as a matter of law.

C. That the doctrine of comparative injury has no application where the acts sought to be enjoined are tortious and amount to an invasion of a legal right, or where the court below decides the question purely as one at law.

D. Equity may be invoked to prevent an anticipated injury, especially where the allegations of the bill in regard thereto are not denied.

We shall therefore, present our views on these propositions as briefly as possible:

A.

"WHEREVER A LEGAL RIGHT IS ABOUT TO BE TORTIOUSLY INVADED, THE OWNER THEREOF IN AN APPLICATION FOR ITS PROTECTION, NEED NEITHER ALLEGE NOR PROVE ACTUAL DAMAGES."

We maintain the integrity of this proposition on both principle and authority, and contend that plaintiff being the owner of the Valentine and Belmont mining claims, such ownership includes everything beneath the surface of said claims, except veins which apex outside their boundaries, and that plaintiff is entitled to the exclusive possession and enjoyment thereof, under Section 2322, R. S. U. S.; that the subsurface of a claim is a part and portion of the substance of the claim, and that any trespass thereon by which any part of the substance of said claims is removed or destroyed is an invasion of plaintiff's legal rights from which irreparable damages will be inferred or presumed, and need not be alleged.

Heilbron v. Canal Co., 75 Cal. 426, (unlawful diversion of water);
Moore v. Massini, 32 Cal. 590, (Quarrying asphaltum);
Moore v. Clear Lake Water Co., 68 Cal. 146, (Unlawful diversion of water);
Vestal v. Young, 147 Cal. 721, (Changing location of ditch);
Richards v. Dower, 64 Cal. 62, (Excavating tunnel);
U. S. v. Guglard, 79 Fed. 21.

In the litigation between the Montana Company and the St. Louis Company no actual damages were alleged, and it appeared from the facts stipulated none could exist. The excavation of a tunnel, however, was enjoined.

> *St. Louis Min. Co. v. Montana Min. Co.*, 113 Fed. 900;
> *St. Louis Min. Co. v. Montana Min. Co.*, 194 U. S. 235.

B.

"WHERE A LEGAL RIGHT IS SOUGHT TO BE PROTECTED BY INJUNCTION AGAINST A TORTIOUS INVASION, IF THE COURT BELOW DENIES SUCH INJUNCTION AS A MATTER OF LAW, THE DISCRETION OF THAT COURT IS NOT INVOLVED OR EXERCISED AND THIS COURT ON APPEAL MUST DETERMINE WHETHER THE ORDER OR DECISION OF THE COURT BELOW WAS ERRONEOUS AS A MATTER OF LAW."

We submit that the rule adopted by this court upon the hearing of appeals from orders refusing or granting injunctions, that the determination of the court below being made in the exercise of its discretion, will not be interfered with on appeal, except for an abuse of discretion, is not applicable on this hearing. The court below *did not exercise any discretion,* but made its decision upon *a legal proposition alone.* Where no discretion is exercised and the order of the court appealed from is based upon a decision of law alone, the question to be considered by this court is whether or not the court below committed an error.

The word "discretion" has been considered in the case of *Hennessy v. Carmony,* 50 N. J. Eq. 616. The court say:

> "If, by 'discretion' is here meant that the Judge must be discreet and must act with discretion and discriminate and take into consideration and give weight to each circumstance in the case in accordance with its value in a court of equity, then that amounted to just what it was required to do in every case."

The court added:

> "But if the word 'discretion' in this connection is used in its secondary sense, and by it is meant that the Chancellor has the liberty and power of acting in finally settling property rights at *his discretion, without the restraint of the legal and equitable rules governing these rights,* then I deny such power."

The court say in *Hanover Star Milling Co. v. Allen & W. Co.,* 208 Fed. 513:

> "Though an order granting or denying a preliminary injunction will not be disturbed, except for an abuse of discretion, *a proper discretion does not include the misapplication of the law to conceded facts."*

Citing:

Winchester Repeating Arms Co. v. Olmsted, 203 Fed. 493.

It is said in *Samson Cordage Works v. Puritan Cordage Mills,* 211 Fed. 603:

> "The important question is whether its denial was clearly an improvident exercise of discretion; for the general rule governing the review of orders either granting or denying

> preliminary injunctions is, that the order should not be disturbed unless it clearly appears *that the court below has exercised its discretion upon a wholly erroneous conception of the pertinent facts or law.*"

In the case of *James v. Evans,* 149 Fed. 136, the action was for damages growing out of an alleged conspiracy between Freeman and James; the verdict was for damages against Freeman alone. James had judgment entered in his favor. Freeman made a motion for a new trial, which was granted; a motion was also made to strike James' judgment from the record, which was also granted. The court below held that the new trial applied to both Freeman and James on the ground that if there was any liability it was a joint one and existed against both Freeman and James.

The appellate court reversed the order striking the judgment from the record, and also the order granting the motion for a new trial, and says:

> "While it is a general rule that the allowance or refusal of a new trial rests in the discretion of the court and will not be interfered with on writ of error, it is well settled that this rule has no application where such allowance or refusal results from a clear abuse of discretion, and when a new trial is awarded solely *by reason of an erroneous opinion that under the pleadings the verdict could not, by any possibility, lawfully have been found,* there is in legal contemplation an abuse of discretion which can be corrected on a writ of error. In awarding a new trial necessarily involving and affecting the vacation and setting aside of a verdict and judgment in favor of James, *the court*

acted, we think, under a mistaken apprehension of the law, and its action in that regard was not had in the exercise of a sound legal discretion, but constituted reversible error."

In the case of *Pugh v. Bluff City Excursion Co.*, 177 Fed. 399, there was under consideration an action by a widow for damages for the death of her son on account of negligence of the defendant. The testimony showed that at the time of his death the son was 29 years old, and earning $20.00 per week, most, if not all of which went to the support of the mother. The facts were not seriously disputed. After the jury were out some time, they came into court and reported disagreement, and asked if they might find a verdict for nominal damages, to which the court replied they were authorized to find a verdict to which they thought the plaintiff entitled. The jury returned and brought a verdict for plaintiff and fixed damages at $1.00. The motion was overruled and plaintiff excepted. The matter was taken to the appellate court on writ of error. That court says:

> "It is a general rule that the granting of a new trial is a matter of discretion, and will not be reviewed, but it is not so when the verdict is inconsistent upon its face or shows an abuse of power on the part of the jury. *If the granting of the motion is a positive duty, it is not discretionary.* If it is necessary to correct a mistrial, it becomes a positive duty to set the erroneous proceedings aside and grant a new trial, and such, we think was the case when the jury found plaintiff was entitled to recover. If she was, it is absurd to say that she is entitled to only nominal damages. The

conclusion seems unavoidable that the verdict was simply a compromise to prevent disagreement."

Memphis Railway Co. v. Illinois Railway Co., 242 Fed. 617.

In this case, the court says:

"Notwithstanding the established rule that the granting or refusing of a new trial rests in the sound discretion of the trial court, and cannot be made the subject of review on writ of error, if as defendant claims, *a plain prejudicial error was committed* in the denial of a new trial, * * * it is proper that such error be considered."

Richards v. Dower, 64 Cal. 62, holds that cases of palpable legal error are excepted from the rule under which appellate courts decline to interfere with the granting, refusal, continuing or dissolving injunctions.

See also:

Louisville Tel. Co. v. Cumberland Co., 111 Fed. 663;

Kerr v. New Orleans, 126 Fed. 920;

Massie v. Buck, 128 Fed. 27;

Texas Traction Co. v. Collier, 195 Fed. 65;

Vogel v. Warsing, 146 Fed. 949.

Now applying these principles to the matter under consideration:

It is alleged in the complaint that appellee is about to commence the mining of a vein extralaterally which lies underneath the surface of the appellant's mining claims; that it will not confine

its workings within the limits of the vein, but will proceed outside the vein and make large and extensive excavations underneath the surface of appellant's mining claims, and remove the substance of the estate therefrom. Appellee in its answer alleges that it had commenced work, and that it would, in the actual mining of said vein, go outside the boundaries of the vein wherever and whenever necessary for the *profitable and economical* working of the vein. Thus the *question of law* came squarely before the court to determine whether the appellee has any right to go outside the vein and excavate, extract and remove parts or portions of the claims belonging to the plaintiff. If it has the right so to do, then the injunction should be denied. If appellee, under the mining acts of Congress, is confined to the limits of the vein itself in the working thereof extralaterally, it has no right to go beyond the vein, and appellant was entitled to the injunction. This was the sole and only question involved in the court below, as is fully shown by the bill of exceptions to the ruling of the court denying the injunction. It is recited in said bill:

> "That upon the hearing of the matter, counsell for plaintiff in response to an inquiry from the court, stated that the sole question involved and presented for determination, was whether in mining the Sixteen to One vein extralaterally underneath the surface of plaintiff's claims, the defendant was confined to working entirely within the walls of its vein, or whether it had the right to cut into the country rock on either side of the vein where necessary for its mining operations, either to keep its workings

> straight and regular, as is customary in such operations where the vein undulates or is not direct, or where the vein narrows down to a width less than the convenient and ordinary width of the usual mining operations; plaintiff's contention being that the right of plaintiff was confined to operations entirely within the walls of the vein, and that those walls could not be transgressed, no matter how narrow the space. That upon this statement, the court without hearing from counsel for defendant stated that the application for a preliminary injunction would have to be denied. (Trans. page 33)

We submit that the court exercised no discretion in the matter at all, but decided that the fundamental legal principle upon which we based the right to a preliminary injunction, could not be sustained. No court can have any *discretion* in its decisions upon legal propositions. Any decision, whatever it may be, is correct or erroneous.

C.

"THAT THE DOCTRINE OF COMPARATIVE INJURY HAS NO APPLICATION WHERE THE ACTS SOUGHT TO BE ENJOINED ARE TORTIOUS AND AMOUNT TO AN INVASION OF A LEGAL RIGHT, OR WHERE THE COURT BELOW DECIDES A QUESTION AS PURELY ONE AT LAW."

We submit that the question of comparative injury or damages is never applicable or considered:

(1) Where the injunction is sought to prevent the unlawful invasion of a legal right.

American Smelting Co. v. Godfrey, 158 Fed. 238;

American Smelting Co. v. Godfrey, 158 Fed. 225-230;

Sullivan v. Jones, 208 Pa. State Rep. 540.

(2) Where the injunction is granted or refused *as a matter of law.*

Judge Sawyer in the case of *Woodruff v. North Bloomfield Gravel Co.,* 18 Fed. 807, states the rule with his usual precision and clearness as follows:

> "But we have nothing to do with this question as to the comparative importance of the conflicting interests or the inconvenience to the defendants by the stoppage of their works *if they infringe the material substantial rights of others. It is the province and imperative duty of the court to ascertain and enforce the legal rights of complainant no matter what the consequence to the defendant may be. This duty no court could evade if it would.*"

It seems settled where from the undisputed facts in the case the *tortious acts of a defendant will invade the legal rights of the complainant, the question of comparative injury will not be considered* (see Note 31 L. R. A. (N. S.) 881, 888 et seq.).

Judge Marshall in *McClerry v. Highland Boy Mining Co.,* 140 Fed. 951, says with reference to the assertion that comparative injury should always be considered upon an application for an injunction:

> "I am unable to accede to this statement of the law. If correct, the property of the poor is held by uncertain tenure, and the constitutional provisions forbidding the taking of property for private use would be of no avail.

As a substitute it would be declared that private property is held on the condition that it may be taken by anyone who can make a more profitable use of it, provided that such person shall be answerable in damages to the former owner for his injury. In a state of society, the rights of the individual must to some extent be sacrificed to the rights of the social body; but that does not warrant the forcible taking of property from a man of small means to give it to a wealthy man on the ground that the public will be indirectly advantaged by the greater activity of the capitalist. Public policy I think, is more concerned in the protection of individual rights, than in the profits to inure to individuals by the invasion of those rights."

In *Arizona Copper Co. v. Gillespie,* 100 Pac. 465, it was contended that the question of comparative injury should be taken into consideration. The court denied the contention and said:

"*To withhold relief where irreparable injury is and will continue to be suffered by persons whose financial interests are small in comparison to those who wrong them, is inconsistent with the spirit of our jurisprudence of the state;*"

and added:

"It is in effect saying to the wrongdoers, 'if your financial interests are large enough so that to stop you will cause you great loss, you are at liberty to invade the rights of your smaller and less-fortunate neighbors'."

In *Wente v. Commonwealth Fuel Co.,* 232 Ill. 526 (83 N. E. Rep. 1049), it is said:

"If the *existence of a private right and the violation of it are clear,* it is no defense to show

that a party has been to great expense in preparing to violate the right."

D.

"EQUITY MAY BE INVOKED TO PREVENT AN ANTICIPATED INJURY, ESPECIALLY WHERE THE ALLEGATIONS OF THE BILL IN REGARD THERETO ARE NOT DENIED."

Counsel for the appellee may insist that an injunction will not lie in this case under the allegations of the complaint, for the reason that such allegations do not show any present invasion of rights. We insist, however, that one of the strongest features of equity jurisprudence is its power to prevent anticipated action and threatened injury.

In the case of *Lake Erie & W. R. Co. v. Board of Commissioners,* 57 Fed. 945, it is held that it is not a defense to an application for a preliminary injunction that defendants have not already taken any action in the matter in which they sought to be restrained, when the bill charges that they intend to take such action unless restrained, and such allegation is not denied. In that case, a bill was filed to restrain the enforcement of a rate fixed by statute which specially charged the defendants with its enforcement. The defendant made no resistance to the granting of the preliminary injunction and filed no plea, answer or affidavit contradicting the allegations of the complaint.

In *Vicksburg Water Co. v. Mayor of Vicksburg,* 185 U. S. 65, the Supreme Court said:

"It is further contended that this bill does not disclose any actual proceedings on the part of the city to displace complainant's rights under the contract; that mere apprehension that illegal action may be taken by the city, cannot be the basis of enjoining such action. and that, therefore, the Circuit Court did right in dismissing the bill. We cannot concede to this contention. It is often made in cases where bills in equity are filed to prevent anticipated and threatened action, but it is one of the most valuable features of equity jurisprudence to anticipate and prevent a threatened injury, were the damages to be irreparable. The exercise of such jurisdiction, is for the benefit of both parties in disclosing to the defendant that he is proceeding with the warrant of law, and in protecting the complainant from injuries, which if inflicted, would be wholly destructive of his rights."

Now, in this case, it is alleged in the complaint that the appellee will go outside the boundary of the vein and excavate and remove the substance of appellant's claims. This allegation is not only not denied in the answer, *but appellee alleges that it has already commenced work and claims the right to, and will in the prosecution of this work, go outside the boundary of the vein wherever and whenever it may be necessary to profitably and economically work and mine said vein.*

The doctrine for which we contend is sustained in the two cases of *St. Louis Min. Co. v. Montana Min. Co.,* 113 Fed. 900, and *St. Louis Min. Co. v. Montana Co.,* 194 U. S. 235.

These are the same cases heretofore referred to in this brief. There, the plaintiff did not assert

or claim that it would be damaged by the action of defendant in constructing its tunnel underneath their surface boundaries, but that made no difference with the decision of the courts.

Now taking up the important question on this appeal:

"HAS ONE, RIGHTFULLY FOLLOWING A VEIN EXTRALATERALLY BENEATH THE SURFACE OF CLAIMS OWNED BY ANOTHER, THE RIGHT TO GO OUTSIDE OF THE BOUNDARIES OF THE VEIN IN THE PROSECUTION OF HIS WORK?"

The right to follow a vein extralaterally, is given by Section 2322 R. S. U. S. That section provides that the location of a quartz lode mining claim gives to the locator

> "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically".

We contend that this section gives the following rights:

First. It gives to the owner of such location, the exclusive right of possession and enjoyment of the surface within the lines of their location.

Second. It gives to the owner of such location the exclusive right of possession and enjoyment of all veins, lodes or ledges throughout their entire

depth, the top or apex of which lies inside of such surface lines extended downward vertically.

Third. It gives to the owner the exclusive right of possession and enjoyment of *everything beneath his surface ground* except veins which apex outside thereof.

We presume counsel will concede the above propositions to be correct, except that it possibly may be contended that the owner of a valid quartz location is not given the rights to the extent above stated in the third subdivision.

The mining law of the United States is all comprised in one Act of Congress and Amendments thereto. All the sections and parts thereof are in *pari materia,* and should be construed together. Under the well-known principle of statutory construction, each section must be construed in harmony with the other section of the act, and such construction be placed thereon as will render the entire act harmonious. Now the right to a patent is based entirely upon the existence of a valid location. Nothing can be patented unless it is within the limits of a valid location and covered by Section 2322. Sections 2325 et seq. provide for the issuance of patents "for *land claimed and located for valuable deposits*". By patent from the government, the full legal title is given to the land within the boundaries of the location, including all veins, lodes or ledges which apex therein. If the land beneath the surface is not a portion of the

possessory rights gained by the act of location, it could not be patented.

The extent of the rights given to a patentee of a location made under Section 2322 has been passed upon by this court in the case of *St. Louis Co., v. Montana Co.,* 113 Fed. 900, and by the Supreme Court of the United States in the same case on appeal, 194 U. S. 235, and it has been held in both of these decisions, that such patentee is given the exclusive right of possession and enjoyment, not only of the surface and all veins which apex within its boundaries, but also of *everything beneath the surface,* except veins which apex outside thereof.

It is said by this court in 113 Fed. (supra) that

> "The mining laws as we construe them grant to a mineral locator more than the mere right to the surface of his claim and to the veins or lodes which have their apices therein."

Then after referring to Sections 2319 and 2325 of the statute, further says:

> "These provisions tend to indicate that the patent when issued is a grant of land with all the rights incident to common law ownership. The reason for specifying in the description of the grant the 'veins, lodes and ledges' is for the purpose of defining what is granted in addition to the land, viz: the right to pursue such veins, lodes and ledges extralaterally in case they depart from the perpendicular and extend beyond the side lines of the claim."

This court says in the same case that locators

> "are given the right to the possession of the surface and of *everything within their own*

claims, except the veins or lodes therein which may have their apices in the surface of another claim.''

And again:

> ''It is true that the statute and patents thereupon issued confer upon the locators of a mining claim in terms only, 'the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location;' and that the statute further specifies that such locators, notwithstanding their extralateral rights, shall have no authority to enter upon the surface of a claim owned or possessed by another.''

It was contended in that case that the patent to the Nine Hour Claim only conveyed the surface of the claim, together with all veins, lodes or ledges having their tops or apices within the surface boundaries thereof, and that the underground portion of such claims aside from the veins apexing therein was still practically a part of the public domain.

On appeal to the Supreme Court of the United States, the same question was pressed upon that court by appellant. Judge Brewer says:

> ''Does the patent for a lode claim take the subsurface as well as the surface, and is there any other right to disturb the subsurface than

> that given to the owner of a vein apexing without its surface, by descending on its dip into the subsurface to pursue and develop the vein? We are of the opinion that the patent conveys the subsurface as well as the surface, and that so far as this case discloses, *the only limitation on the exclusive title thus conveyed, is the right to pursue a vein, which on its dip enters the subsurface.*"

Starting, therefore, with this proposition as established, we contend that by Section 2322, while one who owns a claim within which the apex of a vein exists, has the right to follow such vein on its dip beneath the property of others, this right must be confined to the vein itself.

Section 2322 in express language precluding the right of the owner of a vein extralaterally from entering upon the surface of the claim under which the vein dips, we contend that the same rights attach to the subsurface, and that if the statute prevents the entry upon the surface by express terms, it must be so construed as to equally prevent the entry upon the location beneath the surface, because both rights come from the same source, and are created by the same section of the statute.

This question is a cold, legal proposition, depending entirely upon the construction of Section 2322. If that section gives this right to the owner of a vein extralaterally, we are defeated in our contention. If, however, it does not give such right, we insist that our contention must be sustained, irrespective of the possible unpopularity thereof,

and irrespective of the monetary or other damages which may ensue to miners or mining companies. Section 2322 is the chart of all rights to located claims. It was enacted by the legislative branch of the government of the United States, and while it must be construed and applied by the courts, they have no right to invade the legislative functions of Congress and add any right not specifically specified, or in anywise or to any extent, extend the rights specified, although the existence of other additional and collateral rights might, in the mind of the court, be necessary to render the rights specified more beneficial.

The question of the right of one owning the apex of a vein to enter upon the underground parts of a claim into which the vein dips was first brought to the attention of Judge Knowles in the United States District Court, District of Montana, in the case of the Montana Company v. the St. Louis Company. In that case, the Montana Company owned the Nine Hour Mining Claim, and immediately to the northwest thereof and adjoining was situated the St. Louis Claim, which was owned by the St. Louis Mining Company. Within the boundaries of the St. Louis Claim there existed the apex of a vein, which on its dip passed underneath the surface of the Nine Hour Claim. The owner of the St. Louis Claim, for the purpose of "profitably and economically" working its vein on the dip beneath the surface of the Nine Hour Claim, started the excavation of a tunnel within the boundaries of the St.

Louis Claim, which on its extension would cross-cut its vein on the dip about 260 feet beneath the surface of the Nine Hour Claim. The Montana Company brought suit to enjoin the excavation of such tunnel, or the making of any excavations beyond the plane of the boundary line between the two claims. The facts were stipulated by the parties to the effect that no vein would be encountered in the course of such tunnel, under the Nine Hour Claim, except the vein, the apex of which was within the St. Louis ground; that such tunnel would not be run further than the point at which it cut through this vein on its dip, and would be used for no purpose except the working of that vein. In other words, the Montana Company voluntarily stipulated that it would and could not be actually injured or damaged by the construction, excavation or operation of the tunnel. It based its right to an injunction upon the ground that by the construction of this tunnel their rights of exclusive possession and enjoyment of the Nine Hour Claim would be invaded; that a portion of the substance of such claim would be excavated and removed therefrom; that the trespass in the use of the tunnel would be continuous, and that the St. Louis Company would eventually acquire a prescriptive right to that part of the Nine Hour Claim included in the tunnel. It was contended in behalf of the St. Louis Company that such injunction would not lie, because no damages could be shown by the Montana Company; that when the United States granted to the St. Louis

Company the right to follow the vein on its dip in the ground of another person, as incidental to that right, the right existed to mine such vein in a practical, profitable and economical manner, so long as such work would not injure anyone.

Judge Knowles held that by the construction or excavation of the tunnel the rights of the Montana Company to the exclusive possession and enjoyment of the Nine Hour Claim would be invaded; that the substance of their mining claim would be destroyed; that by the continued exercise of the right of maintaining the tunnel the St. Louis Company would eventually gain a prescriptive right to its maintenance and use, and that by Section 2322, the only right granted to the owner of the apex of a vein was the right to pursue or follow the vein itself downward. The St. Louis Company then appealed the case to this court (113 Fed. 900), which sustained Judge Knowles' ruling. That company then appealed the case to the Supreme Court of the United States (194 U. S. 235), where the decision of this court was affirmed.

This court held in effect, that the statute in express terms precludes the right of entering upon the surface of a claim under which the vein dips; that the same rights pass to the *subsurface* as to the surface. If the statute prevents the entry on the surface by express terms, it must be so construed as to equally prevent the entry upon the location beneath the surface.

This court stated the questions involved as follows:

> "The case involves the interesting question whether the owner of a mining claim, who has the right to pursue beyond the side lines of his claim a vein or lode which has its apex within his own claim, is confined in his right to operations within or upon the vein itself, and is without authority to otherwise enter the adjoining claim."

This identical proposition is involved in this case. *The extent* of the exercise of a right to go outside the vein, was evidently not deemed important by this court in that case, nor can it be of any importance for the reason that the extent of excavation beyond the boundary of the vein goes only to the degree of invasion of another's rights. The invasion is complete by going any distance beyond the vein, and must be protected to the same extent as though the excavations were made at great distances from the vein. This court in its opinion confines itself strictly to the consideration and decision of the question above quoted, viz., *Whether the right to follow the vein is confined within or upon the vein itself.*

Briefly stated, appellants' contentions in that case were, that the patent to the Nine Hour Claim simply conveyed the surface thereof and all veins having their apices within the boundaries thereof, and that since the mining law generally confers the right to explore and purchase the mineral land of the United States, appellants had the right to explore for their vein within the Nine Hour Claim,

so long as they interfered with no rights granted to the owner of the latter claim. That, if the patent to the Nine Hour Claim simply granted the surface thereof, and the veins apexing within its boundaries, then the right and title to the subsurface of such claim still remained in the government, and no objections could be made to any work being done underneath the surface of that claim, unless such work interfered with veins which had their apices within the surface boundaries thereof.

This court, after quoting the language of Section 2322, says:

> "But the appellants must find in the same statute the *full measure of their own right.* What are the rights that are given by the patent to the owners of the St. Louis Claim? They are given the right of possession of the surface and of everything within their own claim, except veins or lodes therein which may have their apices in the surface of another claim, so as to give the owner of the latter extralateral rights, *and they are given the right to follow outside their side lines and into adjoining claims, all veins, or lodes which have their apices in their own claims, so as to confer extralateral rights.* THIS IS THEIR RIGHT AND NO MORE."

Judge Brewer in the 194 U. S. 235, illustrates the conditions involved, by referring to the lines of a right angled triangle, taking the dip of the vein as the hypotenuse, the tunnel as the base line, and the boundary plane between the two claims as the perpendicular. He held that undoubtedly plaintiff was entitled to occupy the hypotenuse, because it owned the vein which created the same, and says:

> "May it also occupy the base line. Is it not *in pursuing and appropriating the vein, confined to work in and upon the vein,* or is it at liberty to enter upon and appropriate other portions of the Nine Hour Claim underground, in order that it may more economically reach and work the vein which it owns?"

The Supreme Court then holds that no such rights exist.

We submit that the order of the court below denying the preliminary injunction should be reversed, and that court directed to order its issuance in accordance with the prayer of the complaint.

Dated, San Francisco,
October 5, 1918.

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Attorneys for Appellant.

No. 3205

3

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TWENTY ONE MINING COMPANY (a corporation),
Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INC. (a corporation),
Appellee.

BRIEF FOR APPELLEE.

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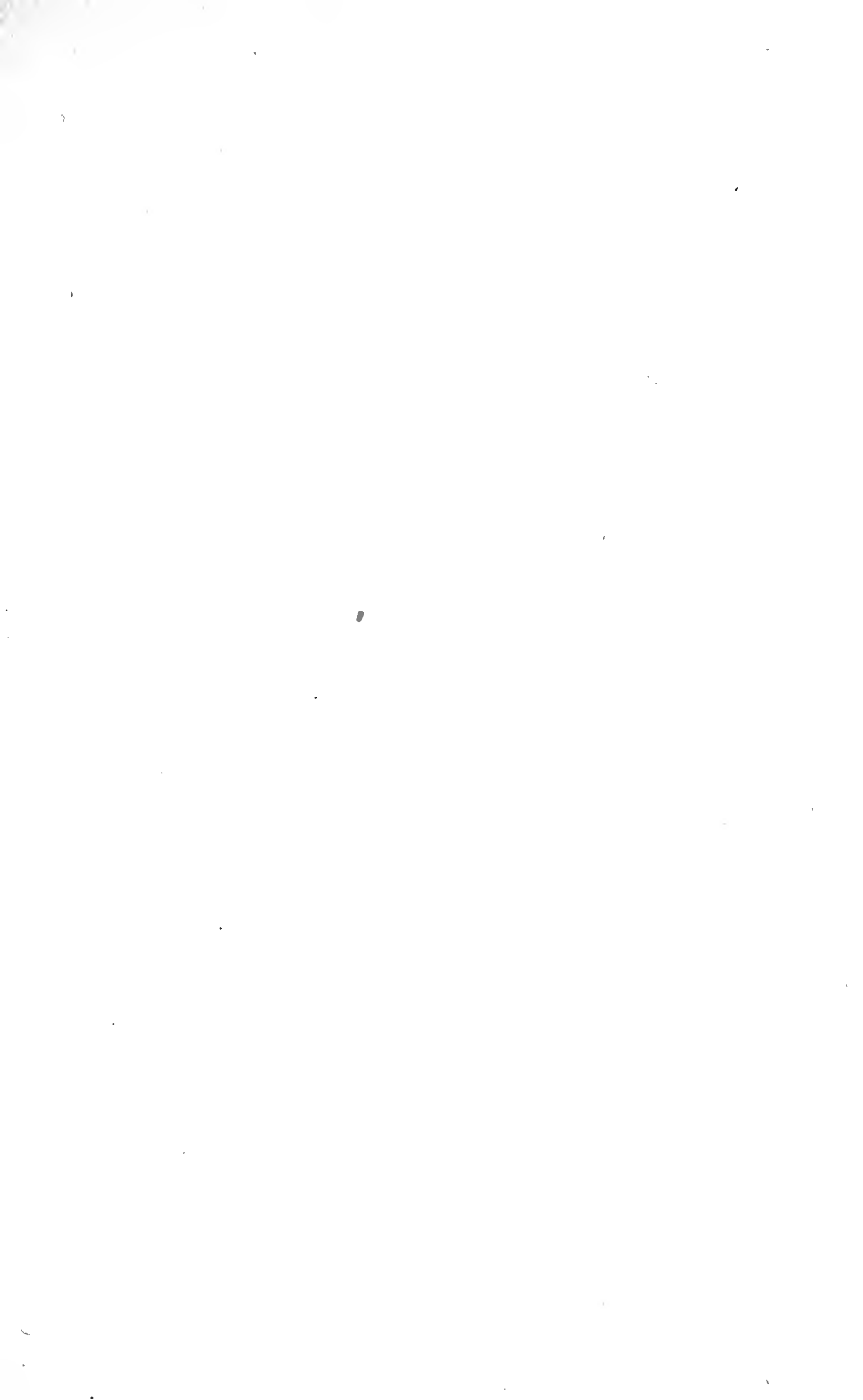

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BRIEF FOR APPELLEE.

Statement of Case.

Certain facts appear in the record which we desire to emphasize. A cross-section showing the vein on its dip and the relation to the Sixteen to One shaft and workings appears at page 51 of the record and will aid in understanding the physical situation.

Appellee is the owner of the Sixteen to One lode Mining Claim in which the Sixteen to One vein apexes. Appellant's suit necessarily proceeds on the assumption that appellee, by virtue of a decree rendered by the court below, in Equity Suit 292, has the right to mine the vein in question, as it

extends extralaterally beneath the surface of appellant's Belmont and Valentine Mining Claims (Complaint, pp. 4-5 of Record). Appellant alleges in its complaint that if appellee is unable to excavate workings outside of its vein boundaries that it cannot mine this vein "*without the expenditure of large amounts of money which would be necessary to perform said mining and work within the limits of said vein*" * * * (Record p. 6) and prays for an injunction restraining appellee from going "outside the limits or boundaries of said vein" * * * (Record p. 7).

In support of its application for a preliminary injunction appellant also filed the affidavit of Frank L. Sizer where he states, that the vein in question "is undulating and waving in its character and of variable width, narrowing down in some instances to about two feet between the walls thereof" (Record p. 20) and that if appellee follows the practice of running its workings on a straight course instead of following each undulation or waive it will necessarily depart from said vein and excavate its workings in country rock (Record p. 21) and quotes the statement of S. B. Connor contained in an affidavit filed by said Connor in another proceeding where said Connor stated that it was the "universal practice" to follow a vein by straight workings and that in running the Sixteen to One workings the best judgment was used and that they were justified from the standpoint of economic and practical mining and that it would

be a practical and economic impossibility to keep these workings entirely within the vein (Record p. 19.)

Appellee in its answer admits that if it be compelled to follow all the sinuousities, curvatures and variations of its vein and must keep within the strict and technical limits and wall boundaries thereof, that it cannot work said vein without the expenditure of large amounts of money. It further alleges that it has been departing and only intends to depart from its vein to the very limited extent reasonably necessary to economic and profitable working as is customary in carrying on mining operations under similar circumstances. It further alleges that *appellant will suffer no damage whatever by reason of the excavation and removal of the small quantities of barren and worthless country rock incident to the mining of the vein through such mine openings* as are reasonably necessary, ordinary and customary (Record pp. 12-15).

These statements are corroborated by the counter-affidavits filed by appellee. S. P. Connor, with over forty years of mining experience, states that the Sixteen to One shaft is the main working shaft of the mine and was run beneath but in close touch with the vein because it was necessary in order to keep it comparatively straight on account of the flattening of the dip of the vein in depth, because of the faulted condition above, and because the footwall rock was more solid and required less timber-

ing and that this position of the shaft was thoroughly justified from the standpoint of economic mining (Record pp. 28-30).

Thomas Gill, actively engaged in mining for 21 years, and foreman for the North Star Mines Company at the Champion Mine, states that it was reasonably necessary to drive the Sixteen to One shaft in the position it now occupies and that it was safer and cheaper to drive in the footwall. That the ore chute at the 300 level was reasonably necessary and it is common practice to cut such chutes in the hanging wall (Record pp. 35-36).

Elisha Hampton, a practical miner for more than fifty years, with a wide experience in California mines and for two years general superintendent of the famous Goldfield Consolidated Mine, in Nevada, states that driving a shaft, as the Sixteen to One shaft was driven, in the footwall of the vein was good practice and commonly done in mining and that it is of the utmost importance to keep the main working shaft of a mine on a uniform grade or pitch. This tends to efficiency and safety and where a vein is faulted and broken as this one is, it would be dangerous and highly inadvisable to carry the main working shaft along the course of the vein, and it was highly advisable and necessary to drive the main working shaft of the Sixteen to One mine into the footwall as was done in this case and that such course is in accordance with the customs of good mining. The same is true of the ore chute driven into the hanging wall. That in

many of the mines where he had experience the shaft was driven into the footwall and gradually flattened out with depth (Record pp. 38-39).

Dr. Andrew C. Lawson states that in his wide experience in all parts of the world and particularly where veins are faulted, "it is *necessary* in many instances to penetrate country rock in order to follow the faulted segment of the vein" and working should be kept as straight as possible for economic reasons and where a vein has undulations and rolls it would be *impossible* in many instances and highly impracticable from an economic standpoint to follow the vein, also that the Sixteen to One workings in question are "reasonably necessary for the operation of the Sixteen to One Mine from an economic standpoint and in entire accordance with the usages and customs of modern mining as observed by him in other mines" (Record pp. 40-41).

A. Werner Lawson states that the Sixteen to One vein rolls and varies greatly in width in various parts of the mine and is faulted in places so that it would be "a *practicable impossibility* as well as a great economic disadvantage" to follow the vein with the main working shaft. That it is also a universal mining custom to cut ore pockets, chutes, etc., in the country rock for practical and economic reasons, etc. (Record pp. 41-42).

M. C. Sullivan, the superintendent of the appellee company, explains fully his reasons for running the main working shaft underneath the vein in solid

wall rock and that he used the utmost good faith in confining his operations as near the vein as reasonably practicable or possible. That these workings near the vein have been run in worthless and waste country rock and cannot possibly cause appellant any detriment or damage whatsoever (Record p. 44).

W. L. Williamson, who has mined for thirty years past and superintended mining operations in many of the mining states of the west, states that to sink the Sixteen to One shaft in the footwall as has been done is not only advisable, but also reasonably necessary; that it would be "poor mining to confine the shaft to the walls of the vein" and that "it is impossible to extract and remove the ore with safety or efficiency where the main shaft follows the irregularities of the vein" (Record pp. 46-47).

N. S. Kelsey, manager of the Argonaut Mine, one of the most important gold producers in the State, says that it is common mining practice and *necessary* to avoid prohibitive expense to keep the grade of the main working shaft uniform and that it is proper and ordinary mining to cut into the walls of the vein to construct ore pockets, chutes, and stations. That the lower portion of the Argonaut shaft, some 4000 feet in depth, departed quite materially from the vein underneath the surface of claims owned by other persons.

At the hearing in the court below, on the preliminary injunction, counsel for appellant stated in response to an inquiry from the court that the sole question involved and presented for determi-

nation was whether in mining the Sixteen to One vein extralaterally the appellee was confined to working entirely within the walls of its vein or whether it had the right to cut into the country rock on either side of the vein where *necessary* for its mining operations, either to keep its workings straight or regular, as is customary in such operations, where the vein undulates or changes in direction or where the vein narrowed down to width less than the convenient and ordinary width of the usual mining operations; appellant's contention being that the right of the plaintiff was confined to operations entirely within the walls of the vein and that those walls could not be transgressed, no matter how narrow the space (Record p. 33). The court immediately recognized the inequity of this doctrine and the gross hardship that would be imposed on the mining industry if it were accepted and denied the application.

Summary of Facts.

To summarize, the following facts are undisputed:

1. Appellee has been awarded this vein by decree of the court below in Equity suit No. 292.

2. A jury has also found that appellant was a trespasser and had unlawfully extracted gold from this vein (see Appeal No. 3188 dismissed by order of this court) .

3. Appellee, in carrying on its mining operations on this vein extralaterally beneath the surface of appellant's claims, has kept as close to the vein as practicable and as established by the affidavits of some of the leading and most experienced mining men on the Coast, it has followed common mining practice and universal mining custom in so doing.

4. The main working shaft of the Sixteen to One Mine has been kept as close to the vein as practicable and for reasons of safety and economy has been sunk in the footwall, but a few feet below the vein and it would be a practical impossibility as well as dangerous for this shaft to follow all the curvatures and rolls and variations of the vein.

5. The ore chute and pocket extending into the hanging wall of the vein from the 300 ft. level, is an ordinary and customary working designed to facilitate the extraction and loading of ore.

6. These slight departures of appellee's workings from the vein have not caused appellant one cent of actual damage because they are all in barren wall rock.

7. To compel appellee to confine its workings within the actual walls of the vein would be a practical impossibility in many places, would be contrary to common mining practice and experience, would be a great economic hardship and in the language of appellant's complaint would result in "the expenditure [by appellee] of large amounts

of money which would be necessary to perform said mining and work within the limits of said vein".

In short, appellant having lost the vein is endeavoring to put appellee to as much unnecessary expense and trouble as possible in mining its vein even though appellant will not suffer one particle of actual damage if appellee continue to mine in accordance with plain, ordinary mining methods dictated by common sense and mining experience.

The Question Involved.

The single point at issue is whether appellee in mining its vein extralaterally is confined to the vein itself and must keep strictly within its technical wall boundaries and limits or whether it has a reasonable and common sense latitude and can mine as other veins are ordinarily mined under similar circumstances.

In other words, the sole question for determination is whether or not the mining statute granting the extralateral right has granted a barren, abortive right, which would be the case in many instances, if appellant's narrow and restrictive contention prevail.

Outline of Argument.

Appellee is confident that it will readily establish the following propositions:

I. That the extralateral grant contained in the mining statute, by its express terms contemplates that the vein owner mining extralaterally shall *enjoy* such right in a rational and common sense manner.

II. That the right to follow a vein extralaterally granted by the federal mining act is the essential right granted as far as lode claims are concerned and this portion of the statute should be liberally construed.

III. That in construing a statute it is the duty of the court to carry into effect its manifest purpose and not to defeat this purpose by technical rules of construction.

IV. That the St. Louis-Montana decisions rendered by this court and also by the United States Supreme Court, while not bearing directly on the question here involved, distinctly recognize that a vein owner in pursuing a vein extralaterally must have a reasonable latitude in such exploration.

V. That the rights conveyed by the extralateral grant are directly analogous to those flowing from the ordinary grant and severance of a vein from the overlying surface as far as the working of that vein with respect to the rights of the surface owner is concerned.

VI. That the enjoyment of the main right to the severed vein presupposes and carries with it all incidental rights that are reasonably necessary for the profitable and economical extraction of the ore.

VII. That in the consideration of a case of this character where a great and vital principle is involved which will seriously affect the lode mining industry, a court of equity should so construe the act in question as to result in the least hardship to all concerned, including the public.

I.

SECTION 2322 U. S. REV. STATS., GRANTING THE RIGHT TO FOLLOW A VEIN EXTRALATERALLY, GRANTS NOT ONLY THE "POSSESSION" BUT THE "ENJOYMENT" OF THE EXTRALATERAL SEGMENT.

Section 2322 U. S. Rev. Stats., gives the locator of a mining location not only the "exclusive right of possession *and enjoyment*" of his surface location, but also *"of all lodes, veins and ledges throughout their entire depth,* the top or apex of which lies inside of such surface lines extended downward vertically". It is to be noted that not only is the locator given the right of possession of his vein extralaterally on its downward course, but he is also given the *right of enjoyment.* And compliance with the statute is equivalent to a grant.

> "A valid and subsisting location of mineral lands * * * has the effect of a grant by the United States of the right of present and exclusive possession."
>
> *Gwillim v. Donnellan,* 115 U. S. 45, 49.

* Italics in this brief are ours.

"The *right of lateral pursuit* is a right conferred by statute. It does not depend upon circumstances, and *is as absolute as the ownership of a vein apexing within the surface lines,* save that it ceases when and at the point that it interferes with the statutory rights of another." Morrow, C. J.

St. Louis M. & M. Co. v. Montana M. Co., (8th C. C. A.) 104 Fed. 664, 668.

"Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. * * * Not only is he entitled to all veins whose apices are within such limits, *but he is entitled to them throughout their entire depth.* * * *"

Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 88.

"The locators 'of any mineral veins, lode or ledge' are given not only 'the exclusive right of possession *and enjoyment'* of all the surface included within the lines of their locations, but 'of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically'."

Calhoun Gold M. Co. v. Ajax Gold M. Co., 182 U. S. 499, 508.

"Extralateral rights are not a mere incident or appurtenance but a substantial part of the property itself which is the subject of the grant. They are not susceptible of a more definite description than that contained in the statute, which the patent follows, because the conditions beneath the surface cannot be ascertained prior to the issuance of patent."

Montana Ore Purchasing Co. v. Boston etc. Co., (Mont.) 70 Pac. 1114, 1124.

The general principles enunciated above are elementary but sustain the conclusion that the statute virtually grants to the locator the right to follow the vein extralaterally and gives him not only the right of possession, which in many instances if narrowly and technically confined to the vein itself would prove a barren and worthless right, but Congress in its wisdom also conferred on the locator the right of enjoyment of the thing of value granted. Instead of intending that an absurd and abortive result should follow from its grant of the vein and the right of possession thereto, as would be the case if the miner did not have the correlative right of mining the vein granted in a reasonable and ordinary and customary manner, Congress also gave him the distinct right of enjoyment so that he might fully enjoy the fruits of the grant of the vein.

II.

THIS GRANT TO FOLLOW THE VEIN EXTRALATERALLY IS THE MOST VALUABLE RIGHT CONFERRED BY THE STATUTE AND IS TO BE CONSTRUED LIBERALLY.

In *Consolidated Wyoming Gold Mining Co. v. Champion Co.,* 63 Fed. 540, 548-9, Judge Hawley, one of the great mining jurists of the West, in speaking of this extralateral grant of the mining statute to the locator, said:

> "*It should be liberally construed in his favor so as to give him the full benefit of the statute in its true spirit and intent in* order to carry

out the wise and beneficent policy of the general government in opening up the mineral lands for exploration and development. * * * One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be *to preserve in all cases the essential right given by the statute to follow the lode upon its dip* as well as on the strike, to so much thereof as its apex is found within the surface lines of his location."

The Supreme Court of the United States in *Del Monte Co. v. Last Chance Co.*, 171 U. S. 55, 66-67, in speaking of this statute, says:

"The primary thought of the statute is the disposal of the mines and minerals, and in the interpretation of the statute *this primary purpose must be recognized and given effect.* Hence, whenever a party has acquired the title to ground within whose surface area is the apex of a vein with a few or many feet along its course or strike, *a right to follow that vein on its dip for the same length ought to be awarded him if it can be done,* and only if it can be done, *under any fair and natural construction of the language of the statute.*"

See also the case of *Tyler Mining Co. v. Last Chance Mining Co.*, 71 Fed. 848, 851.

"When, then, he owns an apex, whether it extends through the entire or through a part of his location, it should follow he owns an equal part of the ledge to its utmost depth. *These are the important rights granted by the law. Take them away and we take all from the law that is of value to the miner.* Courts will not fritter them away by ingrafting into the law antagonistic common-law principles, or other judicial legislation."

The major portion of the foregoing language was quoted with approval by the Supreme Court of the United States in the *Del Monte case,* 171 U. S. 55, 91. In commenting on this portion of the *Del Monte case,* Judge Lindley says it

> "is a clear enunciation of a wholesome principle which prevents the 'frittering away by construction' *of the most valuable right granted by the mining laws"*.
>
> *Lindley on Mines,* Sec. 592.

In *Calhoun G. M. Co. v. Ajax Gold M. Co.,* 182 U. S. 499, 508, the court says:

Under the Act of 1872, "the vein is still the principal thing in that it is for the sake of the vein that the location is made" * * *

> * * * * *"It is not competent for us to add any other condition."* (p. 509.)

And in the recent case of *Jim Butler Tonopah Min. Co. v. West End Con. M. Co.* (38 Sup Ct. Rep. 574), decided by the Supreme Court of the United States, June 10, 1918, the court says that "the extralateral right so created is subject to three limitations". An apex must exist in the claim, the vein can only be followed in its course downward and not on the strike, and only between end line planes; *"but otherwise it is without limitation or exception"*.

And in Sec. 866 of *Lindley on Mines,* Judge Lindley says in interpreting this extralateral grant,

> "nor are questions of doubtful construction of the mining laws to be resolved against it".

"The mining laws were passed for the development of the mineral resources in the public domain of the United States and should therefore *receive a liberal interpretation.*"

Jefferson-Montana Copper Mines Co., 41 L. D. 320.

III

IN THE INTERPRETATION OF A STATUTE THE EFFORT OF THE COURT ALWAYS IS TO CARRY INTO EFFECT ITS MANIFEST PURPOSE.

In *Oates v. National Bank,* 100 U. S. 239, the court, at page 244, says

> "* * * The duty of the court, being satisfied of the intention of the legislature, clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction. * * * And we should discard any construction that would lead to absurd consequences. United States v. Kirby, 7 Wall. 482. We ought, rather, adopting the language of Lord Hale, to be 'Curious and subtle to invent reasons and means' to carry out the clear intent of the law-making power when thus expressed."

In *United States v. Jackson,* 143 Fed. 783, the court says, at page 786:

> "* * * Courts should search out and follow the true intent of Congress, and adopt 'the sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and object of the legislation."

In *Ex parte Ellis,* 11 Cal. 222, the following statement is found:

> "When a particular construction of a statute, applied to a case which it seems by its terms to include, there follows from such a construction an absurd consequence; respect for the legislature will induce the court from thence to conclude that some other construction which will not produce such a consequence, ought to be adopted. Hence every construction which leads to an absurdity ought to be rejected. (Smith's Com. 663.) * * * it is impossible for the legislature to enter into immensity of detail. It can only make laws in a general manner, and in applying their acts to particular cases, the construction ought to be conformable to the intention of the legislature."

In *Castner et al. v. Walrod,* 83 Ill. 171, it is said, at page 179:

> "Every statute should be construed with reference to its object, and the will of the lawmaker is best promoted by such a construction as secures that object, and excludes every other."

IV.

ST. LOUIS MINING CO. V. MONTANA MINING CO. RECOGNIZES THE NECESSITY OF A SPECIAL RIGHT OF EXPLORATION INCIDENT TO THE RIGHT TO FOLLOW DOWN IN OR UPON THE VEIN.

The only case remotely bearing on the subject of the right of an extralateral proprietor to enter beneath the surface of an adjoining mining claim is the so-called *Drumlummon Case* cited by opposing

counsel (*St. Louis Mining Co. v. Montana Mining Co.,* 194 U. S. 235). The question involved in that case was the right to crosscut underneath the surface of an adjoining claim at a place remote from the vein in order to intersect the vein on its downward course. The rights of the apex proprietor incident to following his vein on its "downward course" underneath adjoining surface were not even remotely involved. The court did intimate by way of dictum purely, that an extralateral proprietor would be "in pursuing and appropriating this vein confined to work in *or upon* the vein". Clearly, the case is not authority here where appellee is following down "in or upon" the vein and is not attempting to mine by crosscutting to the vein through the subsurface of adjoining territory. Even if we examine the language of this dictum, which in any event was only thrown out incidentally without any attempt to define the extent of the right to follow the vein, it clearly supports appellee's contention. If the court had intended to strictly confine extralateral operations *in* the vein itself, as is contended for by appellant here, it would not have used the language "or upon". The use of the word "or" indicates another alternative than that expressed by the word "in". The alternative word "upon" must have been used advisedly. If we examine the Century Dictionary as to the meaning of the word "upon", it is found to be practically synonymous with "on". And the word "on" as used in this sense of relative position is defined to mean, "at, near or adjacent to—expressing near

approach". All of appellee's workings are either in or upon the vein in this sense. Therefore, even if *St. Louis v. Montana* can be taken to apply to a state of facts which was not presented to that court, its dictum clearly supports defendant's contention. It will also be noted that Judge Brewer in that case distinctly held that the apex proprietor had "*the right to pursue a vein,* which on its dip enters the subsurface" of another. He does not confine his right to the vein which would often result in defeating the entire purpose of the statute.

We find further support for this contention in the same case decided by this Circuit Court of Appeals (113 Fed. 900, 902), where Judge Gilbert speaking for this court said that the extralateral proprietor

> "is confined in his right to operations within or *upon* the vein itself" and has no "*general* right of exploration within the land of an adjoining patented claim."

Judge Gilbert unquestionably used the expression "general right of exploration" advisedly, having in mind the fact that in following down on his vein the miner must, of necessity, have an incidental and special right of exploration, limited, of course, to that particular purpose.

Appellee is not here contending for any general right of exploration beneath its neighbor's ground, but only for the incidental right of following its vein in a reasonable manner so that it may receive the full benefit of this grant contained in the mining act.

V.

THE EXTRALATERAL GRANT HAS THE EFFECT OF SEVERING THE VEIN FROM OVERLYING SURFACE AND CARRIES WITH IT ALL INCIDENTAL RIGHTS REASONABLY NECESSARY FOR ITS FULL ENJOYMENT.

The extralateral grant is in legal effect a severance of the estate in the extralateral portion of the vein from the surface under which it passes. In this respect it is in strict accord with the common law principle of severance.

> "The grant of the right of lateral pursuit is, in legal effect, a severance of the estate in the vein from the ownership of the soil into which it penetrates after passing on its downward course beyond the vertical planes drawn through the surface boundaries of the location or patent."
>
> *Lindley on Mines,* 3rd Ed. Sec. 568.

> "Therefore when the government grants a vein throughout its entire depth within certain end line planes, the title to the vein is severed out of the adjoining land into which it penetrates, and the estate in the land overlying the dip is to that extent lessened. Instead of being in derogation of the common law this class of grants is in absolute harmony with it. It is not true, therefore, that the statute should be strictly construed because it contravenes the common law" * * * (Id.)
>
> "This grant of the fee in the vein may be accompanied by certain easements. To illustrate: The right to follow the vein into adjoining lands frequently cannot be exercised without disturbing some portion of the inclosing rock. The grant of the vein carries with it whatever is reasonably required for its enjoyment and without which the grant would be ineffectual." (Id.)

> "The underlying principles involved may be thus expressed: The proprietor of the minerals has a right to win them. In exercising this right all privileges reasonably necessary for its full and fair enjoyment are necessarily implied; but these privileges must be exercised with due care and in a lawful manner, so as not to wantonly or unnecessarily interfere with the rights of the surface owner."
>
> *Lindley,* Sec. 812.

> "A grant of minerals implies the right to win them from the underlying soil." * * * "He may use the underlying stratum of the containing chamber for drainage, support for tramways and the like." (Sec. 813a.)
>
> "As heretofore noted, the miner is authorized to use such means and processes for the purpose of mining and removing the minerals as may be reasonably necessary in the light of modern invention and of the improvements in the arts and sciences." (Sec. 814.)

Snyder on Mines, Sec. 789, states that for the purpose of extralateral pursuit

> "The miner has the right to dig all needful shafts and run all necessary drifts and tunnels, levels and stopes" * * *

and he may have

> "proper avenues for the removal of all ores belonging to him".

As has been noted, the extralateral sweep of a vein with respect to the overlying surface produces a situation identical to that existing under the common law principle of severance of a vein from surface ownership and the vesting of these respective properties in different persons. The surface owner,

with one point of distinction, has the same right to his surface and all the subsurface excepting only the vein of mineral as it extends beneath the surface, where the severance has taken place at common law, as is the case with the surface owner underneath whose surface a vein extends extralaterally. One point of distinction exists through the fact that the surface proprietor under common law severance must often yield up enough surface and subsurface so that the owner of the minerals can sink from the surface and reach the vein in depth, while the apex proprietor under the mining statute reaches the extralateral segment of his vein subjacent to the adjoining surface by following the vein down from the apex in his own ground. However, when once the vein is encountered beneath adjoining surface under either system of law the principles governing and rights incident to the mining of the vein are identical in every respect.

VI.

A GRANT OF THE MINERAL UNDERLYING THE SURFACE OF LAND OWNED BY ANOTHER CARRIES WITH IT BY IMPLICATION THE RIGHT TO DO WHATEVER IS REASONABLY NECESSARY FOR THE BENEFICIAL USE AND ENJOYMENT OF SUCH MINERAL.

It is held in these common law cases that the surface owner is entitled to everything beneath the surface (just as was held in the *St. Louis-Montana Case*), except the vein and the incidental rights necessary to reach and properly mine the vein. This right to the vein, however,

"necessarily implies the right to use or remove such portions of the containing strata as may be necessary or proper for the convenient and proper removal of the mineral itself. This is strikingly manifest in both of the cases at bar. In one of these it appears that the coal vein in the field in which the Indian Camp Coal Company is operating averages about four feet in thickness; and in the other that the coal vein where the Emma mine is located is from 30 to 38 inches in thickness. It is evident that if the mine-owner is to be restricted to the exact limit of the thickness of the vein of mineral with no right to remove any portion of the superimposed strata for necessary headway in working, or in making the mine secure, or with no right to use or remove any portion of the underlying strata for drainage, support for tramways and the like, the grant to him of ownership in the mineral would be of little practical value or none at all."

Moore v. Indian Camp Coal Co., (Ohio) 80 N. E. 6, 7-8.

Where he has the right to the mineral, he has the right

"to use such means and processes for the purpose of mining and removing them as may be reasonably necessary, in the light of modern inventions, and in the improvement of the arts and sciences * * * these incidental rights of the miner, which are appurtenant to the grant of the mineral rights are to be gauged by the necessity of the particular case", and are such "as are *ordinarily used in such business* and may be reasonably necessary for the *profitable and beneficial enjoyment* of his property".

Williams v. Gibson, (Ala.) 4 So. 350, 352-354.

Title of the owner of the mineral is an estate in fee,

> "and in exercising this right, the miner has the incidental right for *the removal of so much of the containing strata as may be reasonably required for the operation of mining*". * * *
>
> *Sharum v. Whitehead Coal Mining Co.*, (8 C. C. A.) 223 Fed. 282, 290-291.

> "In every private grant there passes by implication that which is reasonably necessary to the enjoyment of the thing granted. Washburn on Easements (4th Ed.) pp. 49-54. Hence a grant of the minerals under the surface of the land implies the right to mine them by the sinking of shafts or boring of tunnels and the removal of them through such openings." * * *
>
> "Because a mine may not be worked *practically* without other facilities, the *grant of the minerals implies the right* * * * *in general to do that which is reasonably necessary for the use of the thing granted* * * * it is not requisite to an implied grant that there is an absolute physical necessity for the right demanded."
>
> *Himrod v. Fort Pitt M. & M. Co.*, 220 Fed. 80, 82-84 (8 C. C. A.).

See also the case of *Sheets v. Seldens Lessee*, 69 U. S. 177, 187-8, holding that

> "the true rule on the subject is this, that everything essential to the beneficial use and *enjoyment* of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance",

and Mr. Justice Field cites many instances.

This rule is also supported by the California decisions, Judge Field having also written the following:

> "The true doctrine we conceive to be this, that *everything essential to the beneficial use and enjoyment* of the property designated is, in the absence of language indicating a different intention on the part of the grantor to be considered as passing to the grantee; or as observed by Mr. Justice Story in Whitney v. Olney, 3 Mason 280 'the good sense of the doctrine on this subject is that under the grant of a thing, whatever is parcel of it, or the essence of it, *or necessary to its beneficial use and enjoyment,* or by any common intendment is included in it, passes to the grantee'."
>
> *Sparks v. Hess,* 15 Cal. 186, 196.

> "But we think that whatever realty is incident or appurtenant to the mineralized ground worked as a mine—whatever would pass by a conveyance of the mine itself as an appurtenance thereto—is within the meaning of the requirement (mining grôund). The transfer of a thing transfers all of its incidents and appurtenances." (Civil Code, Sec. 1084.)
>
> *McShane v. Carter,* 70 Cal. 310, 313, 315.

> "Whatever is indispensable to the exercise of the privilege (mining for gold) must be allowed him; *else it would be a barren right, subserving no useful end."*
>
> *Clarke v. DuVal,* 15 Cal. 85, 88.

> "This right carries with it all incidents necessary to the full *enjoyment* of the right to take the gold.'
>
> *Hodgson v. Field,* 7 East 613.

"The general rule of law is, that when a party grants a thing, he by implication grants whatever is incident to it or necessary to its beneficial *enjoyment*. The incident goes with the principal thing."

Cave v. Crafts, 53 Cal. 135, 140.

"A 'mining right' upon a specific piece of ground is a right to enter upon and occupy the ground, for the purpose of working it, either by underground excavations or open workings, to obtain from it the minerals or ores which may be deposited therein. By implication the grant of such a right carries with it whatever is incident to it and necessary to its beneficial *enjoyment*."

Smith v. Cooley, 65 Cal. 46, 57.

"A grant of a tunnel right carries with it by implication every incident and appurtenant thereto—including right and easement necessary for the full and free *enjoyment* of the tunnel right."

Scheel v. Alhambra Min. Co., 79 Fed. 821, 825.

"The express grant of a particular right carries with it by implication the additional right, sometimes called a secondary easement, of doing whatever is reasonably necessary for the *enjoyment* of the right granted."

Willoughby v. Lawrence, (Ill.) 4 N. E. 356, 360.

"The law conclusively presumes it to be the intention of the parties that the grantee shall *enjoy* beneficially the subject of the grant."

White v. Eagle Co., (N. H.) 34 Atl. 672, 674.

See, also, *Ingle v. Bottoms,* 66 N. E. (Ind.) 160, 162.

> "A grant of minerals in the land gives a right to mine for them * * * *The owner of the mine may keep pace with the progress of invention and ingenuity, so far as is necessary to a profitable working of his property* in competition with rivals."
>
> *Martin v. Bowster Im. M. Co.,* 55 N. Y. 538; 14 A. R. 222, 328-333.

See, also, *Baker v. Pittsburg R. Co.,* (Pa.) 68 Atl. 1014, 1015 to 1016.

> "The maxim of the law is that whoever grants a thing is supposed also tacitly to grant that without which the grant would be of no avail. Where the principal thing is granted the incident shall pass (Co. Litt., 152).
>
> *Jackson v. Trullinger,* 9 Ore. 393.

The same rule of the law applies in England and was in force as a part of the common law that was adopted in America.

> "When anything is granted, all the means to attain it and all the fruits and effects of it are granted also and shall pass inclusive together with the thing by the grant of the thing itself without the words *cum pertinentiis,* or any such like words * * * by the grant of mines is granted power to digge them * * * "
>
> *Sheppards Common Assurances* (Touchstone), p. 89.

> "Where minerals are granted the presumption is that they are to be enjoyed, and that a power to get them is also granted as a necessary incident. (See par. Ld. Wensleydale Rowbothen v. Wilson, 8 H. L. Cas. 360).

"So it has been observed that when the use of a thing is granted, everything is granted whereby the grantee may have and enjoy such use" (and where coal mines are reserved out of a deed of conveyance of land) all things depending on that right and necessary for its enjoyment were also reserved (as incident in Dand v. Kingscote, 6 M. & W. 174).

Brooms Legal Maxims, pp. 367, 368, 369.

Where a conveyance did not expressly grant the right to work and get the mines or define the rights of working

"all such powers of working were impliedly given as were reasonably sufficient to enable the lord (or his lessees) to get the mines and carry them away".

Bainbridge on Mines and Minerals, 5th ed., p. 363.

"And a power to dig for and work minerals carries with it *the right to remove such parts of the strata as have to be removed* either in making the shafts to win the minerals *or in getting the minerals when won.*"

Macswinney on Mines (3rd ed.), pp. 398-9.

And in Scotland, Stewart says:

"In the case of severance of surface and mineral ownership, the mineral owner is entitled to such use of the other strata * * * as is reasonably necessary for the enjoyment of the mineral estate so severed. * * * In a grant or reservation of minerals there is a prima facie presumption that the minerals are to be *enjoyed;* and, therefore, a power to get them must also be presumed to be granted or reserved as a necessary incident."

Mines and Minerals, pp. 33-34.

We apologize to the court for quoting so extensively on a point that is so self-evident and that is such a well known principle of law, but we feel amply justified in citing to the court a few only of the countless authorities that could be gathered on the subject, in view of the fact that plaintiff has seen fit to bring this action and question the right of defendant to a reasonable latitude in working a vein extralaterally on its downward course, which right of enjoyment has never before been questioned in the long history of Western mining as far as the reported cases indicate.

Reasonable Necessity and Not Absolute Necessity the True Test.

Opposing counsel on page five (5) of appellant's brief states that nowhere in the record does appellee claim that it will be "necessary" for appellee to go outside of the boundary of its vein but that it only desires to do so because it will be more profitable and economical. As a matter of fact absolute and strict necessity is repeatedly shown in the record. Hampton states that it was "necessary to drive the main working shaft" as was done in this case (Record p. 38). The ore pocket and chute was "necessary" (p. 39). Professor Lawson points out that it is "necessary" to cut into the wall rock (p. 40). A. W. Lawson states that it would be a "practicable impossibility to follow the vein in all its variations", etc. (p. 42). Appellant's own affidavit made by Sizer states that in some instances the vein pinches

down to "two feet between the walls thereof" (p. 20) and quotes from Conner's affidavit stating that "it would be a practicable and economic impossibility to follow all the sinuosities of the vein and keep the working entirely within the vein" (p. 19) and also quotes from the verified answer of appellee in another suit where it is alleged that these workings "were *necessary,* essential and proper for such purposes" (pp. 21-22). How anyone can run a working along a two foot vein without cutting into the wall rock or sink a main working shaft on an undulating and faulted vein without doing the same is a problem which yet remains to be solved in the scientific world. In spite of appellant's intimation as to the absence of any claim of necessity on appellee's part, we respectfully submit that such necessity not only definitely appears in the record but is clearly apparent on the very face of the situation.

As a matter of fact, opposing counsel totally misconceive the true rule on the subject. Absolute, compelling necessity of the strict and technical sort is not the character of necessity contemplated by the law on this subject. All that is required is a "reasonable necessity". Appellee's affidavits, not refuted or denied, but on the other hand the statements of which are virtually admitted by appellant in its complaint and supporting affidavit, are overwhelming on the point that appellee's workings are within the bounds of "reasonable necessity".

That the true test is "reasonable necessity" and not absolute necessity is established by practically all of the authorities already cited, but in order to clear up any doubt on the subject, the following are also presented on this special phase of the case:

The Circuit Court of Appeals for the 8th Circuit, in deciding the mining case previously noted, held that the grant of the mineral in land carried with it by implication the right, in general to do that which is reasonably necessary for the use of the thing granted, and also said

> *"it is not requisite to an implied grant that there is an absolute physical necessity for the right demanded."*

> *Himrod v. Fort Pitt M. & M. Co.,* 220 Fed. 80-84.

We commend to this court's attention the full discussion of this subject found on pages 82-84 of the case just cited.

> "The necessity which is to govern is not fixed and unvarying: the right may be exercised in a manner suitable to that business to be carried on * * * and what is perhaps but an expansion of the last proposition, the exercise of the right is not to be confined to the modes in vogue when it was first acquired. The owner of the mine may keep pace with the progress of invention and ingenuity, so far as is necessary to a profitable working of his property in competition with rivals."

> *Marvin v. Brewster Iron Mining Co.,* 55 N. Y. 538.

"The court said that necessary or proper meant (in effect) usual—in other words whatever could not be dispensed with if the mine was to be worked with reasonable efficiency and success was necessary; *scil.* because the word 'necessary' was not to be construed as meaning absolutely necessary but as meaning that which according to the usage of miners working with ordinary skill would be necessary for carrying on the works; and of course whatever was necessary would not be waste, being the ordinary enjoyment of the demised premises" (p. 365).

Bainbridge on Mines and Minerals (5th Ed.).

It is quite evident from the foregoing authority that all that the law requires is that the incidental right shall be reasonably necessary for the beneficial use and enjoyment of the main grant. To accept appellant's contention would mean to overturn all the law on the subject and virtually nullify every grant which did not specify in detail the incidental privileges necessary to give the grantee the beneficial and fair enjoyment of the thing granted.

It is quite clear that the extralateral provision of the mining statute constitutes a grant of the vein to the apex proprietor and results in severing it from the adjoining surface underneath which it dips. That there is no valid distinction between the rights of the apex proprietor to such extralateral segment of the vein underlying adjoining surface and the rights of a common law grantee to the vein which has been severed from the overlying surface. Both are entitled to enjoy the vein granted and both

may exercise all incidental rights reasonably necessary to the full and fair enjoyment of the vein. These incidental rights necessarily include the right to excavate such workings as are ordinary and customary and essential to the profitable and economic working of the vein granted.

VII.

GENERAL PRINCIPLES INVOLVED IN GRANTING INJUNCTIONS OF THIS CHARACTER.

It would seem superfluous to further argue this question in the light of the overwhelming authorities on the merits just cited, but it is important to keep two or three additional principles in mind.

a. **Relative Balance of Convenience and Injury or Doctrine of Comparative Hardships Especially Applicable to Interlocutory Injunctions.**

Opposing counsel state, on pages 21-24 of appellant's brief, that the doctrine of comparative injury has no application in a case of this sort and proceed to cite authority, all of which involved final decrees or a final determination of the question of injunction below. They cite Note to Vol. 31 L. R. A. (N. S.) 881, 888 et seq. An examination of this note will serve to further reinforce the fact that the rule only applies in the case of final decrees. This very note cited, at page 882 subdivision III, points out that the issuance of an injunction *pendente lite,* such as this, is always discretionary. That such is the correct rule is also supported by the following authority:

"It is a settled rule of the court of chancery. in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused."

Russell v. Farley, 105 U. S. 433, 438.

In all cases the court takes into consideration the relative inconvenience to be caused to the parties and will refuse an injunction if it appears inequitable to issue it.

Contra Costa Water Co. v. Oakland, 165 Fed. 518, 533 (9th C. C. A., Gilbert, J.);
Peterson v. Santa Rosa, 119 Cal. 387;
In re Arkansas Ry., 168 Fed. 720, 722;
Rhodes M. Co. v. Belleville Placer (Mo.), 106 Pac. 361, 362; also, 118 Pac. 813;
Pac. Tel. & Tel. Co. v. Los Angeles, 192 Fed. 1009;
Magruder v. Belle Fourche Valley W. W. Co., 219 Fed. 72, 82.

"There is no question about the right and duty of a court of equity in issuing injunctions to take into consideration the comparative injury of the different parties to the suit."

Sharum v. Whitehead Coal M. Co., 223 Fed. 282, 291.

"Where one or the other of the parties is to suffer by the granting or refusing of an injunction pending the action the inconvenience likely to be incurred by each from the action of the court in granting or refusing a tempo-

rary injunction should be balanced, and the court should grant or withhold the injunction accordingly."

Williams v. Los Angeles Ry. Co., 150 Cal. 592.

"In the consideration of such cases, it is the duty of the court to consider the inconvenience and damage that will result to the defendant, as well as the benefit to accrue to the complainant, by the granting of the writ; and where the defendant's damages and injuries will be greater by granting the writ than will be the complainant's benefit by granting the writ, or greater than will be complainant's damages by the refusal of it, the court will, in the exercise of a sound discretion, refuse the writ."

Lloyd v. Catlin Coal Co., (Ill.) 71 N. E. 335.

In the case at bar the only possible injury to plaintiff is the removal of a few cubic yards of barren, worthless country rock. On the other hand, to enjoin defendant from cutting into this country rock, which it only claims the right to where reasonably necessary for its legitimate mining operations, would be to seriously hamper if not totally prevent economic mining operations.

b. Public Interest Demands a Denial of the Injunction Sought.

The following authority is of particular interest, in view of the fact that Secretary of the Treasury McAdoo has issued a proclamation to the effect that it is of the utmost importance to the finances of the country that gold mining continue so that the reserve of gold be not depleted.

> "The writ of injunction is not issuable as a matter of right. The comparative injury and benefit which may ensue from its issuance to the respective parties *and to the public* is to be considered by the court, even where the plaintiff's legal right is established. If the benefit to plaintiff from the writ is small, when compared to the injury to defendant *or to the public,* and the injury to plaintiff can be adequately compensated in an action at law, relief by injunction will be denied, and the plaintiff will be left to his remedy in an action at law * * *
>
> *It is to the interest of the public* as well as of the Alabama Mineral Land Company and the defendant, that what coal cannot be recovered through the Savage Creek stope should be recovered through the Garnsey stope; for otherwise it will be lost."
>
> *St. Louis Union Trust Co. v. Galloway Coal Co.,* 193 Fed. 106, 121.

Will plaintiff urge, in the face of the foregoing authority, that they will suffer greater inconvenience if defendant be permitted to continue mining the small amount of country rock incidental to reasonable mining operations, than defendant would suffer if it be put to the great expense, hardship and practical impossibility of mining its vein economically if plaintiff's drastic claims be allowed.

c. Practical Reasons are Opposed to Appellant's Theory.

Looked at from a broader aspect, even, we feel certain that this court is not going to place a permanent hardship and grievous burden upon the mining industry of the West, by the imposition of

any such selfish and narrow doctrine as is here contended for by appellant. It would impose on every extralateral claimant a hardship that in many instances would be absolutely prohibitive and leave him at the absolute mercy of surface proprietors. It would mean the expenditure of immense sums of money in the endeavor to confine mining operations to the technical limits of the vein, and what end would this immense waste of money and capital serve. Nothing but the selfish whims of the surface proprietor, for he would gain nothing (unless it be a whip-hand over all mining underneath his surface) and on the other hand he would not be injured to the extent of one cent of actual damage if the present system of mining be permitted to continue. This dead loss of capital that would subserve no useful end whatsoever, would also be accompanied by the additional danger to life and limb resulting from the necessity of departing from straight workings in solid rock and substituting therefor irregular and impracticable workings in dangerous ground. Surely the public interest is involved in results such as these.

And to what practical absurdities would such a perverted doctrine lead? Suppose the vein pinches to a knife blade (and the courts have said many times in discussing the right to follow a vein extralaterally that this does not destroy the identity so that the miner may not follow his vein) what is the miner to do if he cannot mine into the walls on each side of his crevice? And suppose the vein

is faulted. Faults do not destroy identity or the right of extralateral pursuit. When the miner comes to the fault, he must cease mining, forsooth, because to search for his faulted segment would compel him of necessity to penetrate country rock and if the faulting be complex, he might have to conduct extensive exploration before encountering the faulted segment. Of course, opposing counsel will contend, if they are consistent, that the miner loses his right to follow the vein and such i the misfortune of circumstances. And suppose the vein has two branches or strands, as is true in the case at bar, must a separate working be run on each branch? Suppose the wall boundaries are indefinite and the ore occurs in pockets or bunches and the limit of mineralization fades into the country rock, as is the case in the Coeur d'Alene. Where shall the miner cease under such circumstances and when will the miner be held to have transgressed his rights? It is to such absurd consequences that appellant's contention leads. It would place the miner at the absolute mercy of every stubborn and litigious surface owner an that is just where appellant would place appellee. A court and a jury below have each determined that appellee is the lawful owner of the vein involved, but appellant is seeking here to obtain indirectly the result it cannot accomplish directly, by rendering appellee's victory barren and worthless.

Appellant admits that appellee has been following customary mining methods in its operations and, therefore, this is a case where this court may, in all justice, announce the law governing extralateral operations under similar circumstances. We welcome the announcement by this court of the law applicable to these facts here presented, since such a declaration of principle will serve as a guide to the court below when the identical problem is presented at the main hearing for final determination there.

With every confidence that this court will uphold and fortify the interests of the miner by allowing him the same reasonable latitude in conducting his extralateral operations as is customary under like circumstances in ordinary mining operations and that a narrow, distorted and unreasonable construction such as that contended for by appellant, of what Congress intended should prove a wise and beneficent statute, will never be sanctioned by this or any other court in the land, this brief is respectfully submitted.

Dated, San Francisco,
October 24, 1918.

Wm. E. Colby,
John S. Partridge,
Grant H. Smith,
Carroll Searls,
Attorneys for Appellee.

No. 3205

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TWENTY ONE MINING COMPANY (a corporation), *Appellant,* vs. ORIGINAL SIXTEEN TO ONE MINE, INC. (a corporation), *Appellee.*	}

REPLY BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO.

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REPLY BRIEF FOR APPELLANT.

Lest some confusion may exist in the mind of the court as to our positions on certain questions argued by appellee, we make the following statement:

1. AS TO THE QUESTION OF NECESSITY.

This question cannot arise, unless this court is of the opinion that the right claimed by appellee to go outside of the walls of the vein, is given by Section 2322, R. S. U. S., or by implication therefrom. Then if it has such right, it can only be exercised in case of reasonable necessity.

2. AS TO THE WORK DONE BY APPELLEE OUTSIDE THE VEIN PRIOR TO THE INSTITUTION OF THIS SUIT.

The court inquired at the hearing, whether this work was involved in this action, and we feel that in fairness to the court, the bearing of such work on the questions involved, should be explained.

Appellant filed its verified complaint herein, for the purpose of procuring a preliminary injunction, and supported the application by the affidavit of Mr. F. L. Sizer. It was deemed proper that it should contain a statement concerning certain work which appellee had theretofore done outside the vein, and the position appellee had taken with reference to its right to do the same work *solely for the purpose of presenting to the court, the proposition that if appellee had theretofore been working outside the vein under a claim of right,* it would be fair to presume that it would continue the same class of work in the future.

By the affidavits filed by appellee in response to the order to show cause, and by the verified answer of appellee, this former work was admitted to have been done, and it is claimed that appellee did the same rightfully. Appellant asks no relief in this action with reference to the former work. Appellee however, has continuously asserted that this work was done by it in the exercise of a right which it had by virtue of the ownership of the vein, and it would seem from the argument of counsel and their brief, that it is sought to have this court determine

in this action whether or not such work was rightfully done. We insist that such question is not involved in this action. If the appellee did the work under a claim of right, would it not probably continue to do the same class of work in the future? This is the only question involved in relation thereto.

It was impossible in our original brief to anticipate what defense counsel for appellee might present to our positions. We shall therefore as briefly as possible reply to appellee's brief:

I.

Proposition I (brief, page 11) states simply the provisions of the statute.

We insist that the exclusive possession and enjoyment therein provided for can only extend *so far as granted by and specified in Section 2322.* The court cannot add by construction, any additional rights, benefits or privileges.

We have no quarrel with the principles announced in the cases cited by counsel on this point. They are general in their character, and simply go to show that the vein extralaterally is property; a part of the location in which the apex may be found, and that the owner of the location is entitled to the vein to its uttermost depth. We do not contest any principle decided in these cases, but insist that the rules which they announced apply only to the rights plainly given by Section 2322.

Counsel says that:

> "The general principles enunciated by these cases sustain the conclusion that the statute virtually grants to the locator the right to follow the vein extralaterally, and gives him, not only the right of possession, which in many instances, if narrowly and technically confined to the vein itself, would prove a barren and worthless right, but Congress in its wisdom also conferred on the locator the right of enjoyment of the thing of value granted."

We see nothing stated in the cases cited which even tend to substantiate counsel's conclusions. Unquestionably, a locator is entitled to the exclusive possession and enjoyment of the vein extralaterally if such vein can be followed. However, we see nothing in the statute disclosing any intention on the part of Congress to give to a locator anything except the *vein* in the physical condition in which it is found. We insist that the extralateral rights given by the statute are confined to the wording of the statute itself. Whatever is granted therein, passes, and nothing else.

II.

With counsel's assertion that Section 2322 is to be liberally construed (brief, pages 13 et seq.), we agree insofar as the protection of rights specifically granted by the statute are concerned, but we insist that the doctrine of liberal construction can never be utilized for the purpose of extending the terms

of the statute and engrafting thereon property or rights not mentioned therein.

And all the cases cited where courts have determined that a liberal construction should be applied to the mining law, are those which involved questions as to the extralaterial right itself as affected by the form of the location, with reference to the course or length of the apex of the vein within its boundaries. We admit that Section 2322 in that regard should be construed so as to give to the locator everything to which he is entitled under the terms of the statute. As Judge Brewer says in the *Del Monte* case, 171 U. S. 55, such right should be awarded to the locator if it can be done,

> "and only if it can be done under any fair and natural construction of the language of the statute."

When, however, counsel seek to add rights to the statute by construction, we insist that the reason for the use of a liberal construction disappears, and should not be applied.

The application of the most liberal rule of construction never goes to the extent of engrafting anything on the statute, or of extending its terms, or giving rights greater than therein mentioned.

III.

Counsel's third proposition (brief, pages 16 and 17) is

> "that in the interpretation of a statute, the effort of the court always is to carry into effect its manifest purpose."

We concede the correctness of this proposition with some limitations however. The purpose of a statute and the intent of the legislative body in its enactment *must be gathered from the statute itself.* As stated by the court in the case of *U. S. v. Jackson,* 143 Fed. 783 (cited and quoted on page 16 of counsel's brief):

> "This is a congressional act, and must be interpreted according to the *intention of Congress, apparent on its face.*"* We ask what there is on the face of the Mineral Act which can be claimed to disclose any intent on the part of Congress that any rights should be given by implication?

IV.

Counsel's fourth proposition is that the opinion of this court in the *Drum Lummon* case, (113 Fed. 900) recognizes the necessity of a special right of exploration incident to the right to follow down, in and upon the vein (brief, page 17).

Counsel evidently appreciates the force of that opinion and seeks to sustain the above proposition by asserting that this court *intimated* in said opinion by way of *dictum merely,* that an extralateral proprietor would be "in pursuing and appropriating his vein, confined to work in and upon the vein." He then seeks to place upon the words used

*Italics in this brief are ours.

in that opinion a meaning which he deems satisfactory, in order that he may erect some seeming argument in his own favor. Presumptively, these words were used by this court, in their ordinary sense, and that when the court said that an extralateral proprietor would "in pursuing and appropriating a vein, be confined to work in and upon the vein" it meant exactly what it said.

We firmly believe that this opinion was well considered and only adopted after mature deliberation and the weighing of every sentence and word therein contained.

Counsel states that:

> "It will also be noted that Judge Brewer in that case, distinctly held that the apex proprietor had 'the right to pursue a vein, which on its dip enters the subsurface' of another. He does not confine his right to the vein, which would often result in defeating the entire purpose of the statute."

We submit that Judge Brewer meant exactly what he said, and that his opinion is perfectly clear.

Counsel also endeavor to construe the language of this court to mean that it was intended thereby to give an extralateral proprietor the incidental right of exploring for his vein under the surface of another's land, because this court used the words, "general right of exploration." We can see nothing in this position, and submit that the opinion is clear and unquestionable.

V.

Counsel's proposition V is that the extralateral right grant has the effect of severing the vein from the overlying surface and carries with it all incidental rights reasonably necessary for its full enjoyment (brief, page 20).

We agree that Section 2322, in effect, amounts to a severance of the vein from the location into which it dips, but assert that such severance does not give to the extralateral proprietor any rights not specifically described in the statute.

In support of this proposition, counsel quotes extensively from Judge Lindley's most valuable work on mines. After a statement that the grant of the extralateral right is in legal effect a severance and should be construed liberally, Judge Lindley says:

> "This grant of the fee in the vein *may be accompanied by certain easements.* To illustrate: the right to follow the vein into adjoining lands, frequently, cannot be exercised without disturbing some portion of the enclosing rock."

Judge Lindley exercised his usual caution in the use of language. He makes no positive assertion, ventures no opinion but merely makes a suggestion.

Counsel's conclusions, however, contained in the last paragraph on page 21, and the first paragraph on page 22 in his brief, do not meet with out approval. He says the only difference between the severance of the title of mineral from the land in

which it is contained, at common law, by private grant, and the severance of the vein made by section 2322, is, that in a private grant, the grantee may enter upon the surface, while under section 2322, he is not allowed to do so. He seems to overlook the fact that all private grants are based upon contract, and that section 2322 is not. These matters will be urged by us in another part of this brief to which we hereby refer.

VI.

In proposition VI (brief, page 22) counsel reaches the culmination of his contentions, and states that a grant of the mineral underlying the surface of land owned by another, carries with it by implication, the right to do whatever is reasonably necessary for the beneficial use and enjoyment of such mineral. He then cites and quotes from a large number of cases, everyone of which involved the construction of a *private grant.*

All private grants rest on contract. When one sells and conveys anything and receives a valuable consideration therefor, it should be and is the law, that by his conveyance, he transfers everything which is reasonably necessary to make the grant effective. Otherwise the consideration to the opposing party would fail. The grantor would be getting something for nothing.

The rule as to private grants that everything is implied necessary to render the grant effective, is

based upon the fact, that all things which could pass by implication, are presumed to be in the minds of the parties when they make the contract, and become part of the contract, although not mentioned therein.

Now applying these rules to the Act of Congress: Under the Mining Statute, the government gives permission to locators to go upon the public domain, and by location, conditionally secure the exclusive possession and enjoyment of land containing mineral veins and all veins apexing within his surface boundaries. It would seem impossible that Congress, when it enacted the mining law, had in mind the physical peculiarities of any veins upon the public domain.

When a person goes upon the public domain and discovers and locates a vein, which, upon development, proves to be too small or too crooked to work economically, he is not bound to purchase it, or spend any more time or money on it. He may abandon his location at once. If he has spent time and money upon the property, in order to ascertain the character of the vein, it is lost to him if he abandons his claim, just the same as though the abandonment was because the vein was not sufficiently valuable to warrant work upon it.

When one begins exploration for the vein, he is charged with knowledge as to the extent of the rights which flow from a location, and is bound to know that the entire procedure is more or less

speculative. If he does not desire to "take a chance", he need not spend any time and money in prospecting for a vein and making a location.

We submit, therefore, that the rule of implication applied to private grants cannot on principle or reason, have any applicability to locations made under the Mineral Act.

REASONABLE NECESSITY.

As a part of his proposition No. VI, counsel treats of reasonable necessity on pages 29 and following.

As hereinbefore stated, this question does not arise and cannot be considered, unless the court finds against us on the main contention involved in this case, and we do not care to add anything further.

VII.

Counsel in proposition VII (brief, p. 33) includes general principles involved in granting injunctions of the character of the one demanded. He states:

> "(a) Relative balance of convenience and injury or doctrine of comparative hardships especially applicable to interlocutory proceedings."

We have discussed this proposition in our opening brief, and have but little to add thereto.

Counsel concede that we are right in our position that the court below did not exercise any discretion in arriving at his decision denying the application for an injunction but held as a legal proposition, that plaintiff was not entitled to the relief asked.

We repeat our assertion made in the opening brief (pages 21 et seq.) that the question of comparative convenience or injury is never applicable or considered where the injunction is sought to prevent the unlawful invasion of a right, or where it is granted or refused as a matter of law.

We might admit, for the purpose of argument, that when a lower court exercises a discretion in ruling upon an application for an injunction, he may take into consideration, the balance of convenience and hardship *for the purpose of determining such discretion.* Here it would have made no difference with the court's ruling, if the balance of convenience and hardship had all been in favor of plaintiff.

Again, referring to the recitations in the bill of exceptions found on pages 20 and 21 of our opening brief, we submit that it is conclusive that the question of discretion was not considered by the lower court. His decision was correct or erroneous as a matter of law, and is subject to review by this court, and we claim that we are entitled to the decision of this court as to its correctness.

Counsel further assert:

> "(b) PUBLIC INTEREST DEMANDS A DENIAL OF THE INJUNCTION SOUGHT" (brief, p. 35).

Under this heading, counsel seeks to impress upon the mind of the court that any action on appellant's part which tends to curtail or limit the production of gold is in violation of the proclamation of McAdoo, Secretary of the Treasury of the United States. It would, indeed, be remarkable if this court should sustain such contention, because, forsooth, the Secretary of the Treasury deems it important to the finances of the country that gold mining be continued, as though appellee's particular mine and mining scheme was under the direct supervision of the Government of the United States. It would be belittling the government to even suggest that it cares anything about, or is in anywise interested in the small mining proposition of appellee in Sierra County.

Counsel cites and quotes from the case of *St. Louis Trust Co. v. Galloway Coal Co.,* 193 Fed. 106, and relies upon the proposition therein claimed to be asserted, that the public is interested in all injunctions, apparently as a *quasi* party.

No question of a preliminary injunction appeared in that case. The case was up for final hearing. Plaintiff demanded a forfeiture of the lease in question on the ground that its terms had been breached; that if they were not entitled to the enforcement of a forfeiture for the alleged breaches, they were entitled to an injunction against any future unauthorized use of certain openings in the mine.

It seems that at the same time plaintiff's predecessors in interest gave the lease, the lessees negotiated a lease of the right to remove coal from adjoining lands; that it was understood by all parties that the lands covered by these two leases should be operated as a single mine, each being essential to the other.

One provision of the lease under construction was as follows:

> "Said lessees may use, during the life of this lease, any slopes, headings, entries and passageways, through, over and across the lands included herein, for the purpose of reaching, giving access to, or mining any other lands which they may lease or buy, provided said lands are within 2500 feet of the main slope opened on the lands embraced in this lease."

The fourth ground of forfeiture claimed by plaintiff was a breach of this stipulation. Plaintiff alleged that defendants had been using certain slopes or passageways to transport coal from other lands which were more than 2500 feet from the main slope. The court stated that the defendants had mined coal on Section 6, and that the nearest boundary of such land was more than 2500 feet from the main slope opened on plaintiff's land, and that therefore such use was beyond the terms of the lease.

The court then holds that the reasonable value of such user would be full compensation for the injury, and says:

> "Payment of the sum which would be the reasonable value of the user would entirely compensate plaintiff for all injury suffered from such use. * * * I think no injunction should be granted, at least until the expiration of a sufficient time to complete the mining of that part of the seam from which both benches are mined, provided the period required for so doing is not an unreasonable one."

The court retained the case for the assessment of compensation for past and future unauthorized user of certain narrow work until the court had been furnished sufficient data to determine the reasonable value of such user, and with leave to the plaintiff to renew his application for injunction, either in this or a subsequent proceeding, if such user continued beyond the period indicated.

It is utterly impossible for us to appreciate how anything involved in that case can be considered as having any bearing upon the proposition involved in the instant case. There was a contract for the user of the way in question. Plaintiff alleged that defendant used the way for a purpose beyond the terms of the contract and sought to enjoin such unauthorized user. The court refused to grant such injunction, but provided plaintiff with compensation for such use. No question arose in that case as to the excavation and removing of a part of the substance of the estate, but merely the question of the use of a right of way, which was authorized by the lease, and the use complained

of was claimed to be beyond the terms of the lease. There was no trespass upon, or invasion of the rights of the plaintiff, or possible irreparable injury, as is contemplated here. The reference to the public in this opinion is purely argumentative, and not the statement of any legal conclusion.

Counsel then state:

> "(c) PRACTICAL REASONS ARE OPPOSED TO APPELLEE'S THEORY."

While this subdivision is placed with the proposition of general principles involved in granting injunctions of this character, it is apparent from the argument that this is urged as a reason for the court sustaining appellee's general position.

Counsel in the discussion of this proposition seems to overlook a principle which has been settled for a great many years, and that is that no right can be based upon a tortious invasion of the rights and property of another. The excavating and removing of any part of the subsurface of the locations belonging to plaintiff would be invading its right to have it remain in the place where nature deposited it, and would be destroying the substance of appellant's property.

It is no excuse to say that appellant would not be damaged. Irreparable damages are absolutely presumed from the invasion of a right. The entire effort of counsel seems to belittle the contention of appellant, and to enlarge the great benefit which they argue would accrue to this country by appellee being allowed to trespass upon appellant's ground.

Counsel speaks of the dead loss of capital which would serve no useful end whatever. We suggest that there is no danger of appellee investing any capital in the operation of this vein, unless it can see good returns from such investment. No capital would be lost, because none would be invested.

We cannot concede any materiality in counsel's suggestions relative to additional danger to life and limb from the works which they would have to construct in case appellant's position is right. Under the laws of California, they would be compelled to make such working safe, and although it might cost them a little more, we can see no reason why they should be excused from such investment instead of being allowed to invade our rights and trespass upon our property.

Counsel assume that the result of the construction of Section 2322, as we contend, would reduce it to an absurdity. We might suggest that an equal absurdity would result from the construction claimed by counsel for appellee. By the construction contended for by appellee, a free license would be given to it to go underneath the surface of our premises, and do with it exactly as they pleased, under the pretense that their acts were reasonably necessary to the economical mining of the vein.

We submit that this last subdivision of the brief cannot be considered by the court at all, because as Judge Brewer says, the right claimed by appellee is statutory, and we must look to the statute to determine its existence and extent.

VIII.

GENERAL OBSERVATIONS.

(a) The purpose of appellant in bringing this action.

Apparently, counsel for appellee are not satisfied to rest the validity of their claim upon their legal rights as established by law, but by direct charge and numerous innuendoes, seek to impress upon the mind of the court, that appellant is acting unfairly; that having lost the right to the vein by a decree of the District Court, and the verdict of a jury, they are now seeking to impose upon appellee, such unnatural obstructions as to render its victory in the litigation of no avail. The decisions under which they claim, may be removed to this court for review, and have no finality until after hearing and decision in this court, or the time for removal thereto, has expired.

We contend that if appellant is right in its position, it makes no difference what purpose may have induced it to take steps to protect such rights. Courts are never influenced in deciding legal propositions by the spirit or reason of either party to the suit with reference to the litigation. This is especially true in the consideration of a question like the one at bar, which wholly depends upon the construction of a statute of the United States. If the law is such that appellee's apparent victory can be of no benefit to it, then it should not be heard to complain.

(b) The question of implied easements and implied grants.

Counsel fail to characterize the right claimed —whether a right of way through, or title to the ground required. It seems conceded that whatever the right is, it has not been granted by the statute in express words, but must be implied, as counsel say, "in order to make the grant of the vein effective."

Under the well-known rule of easements, no such right could be granted by implication. In order that an easement pass by implication from a grant of real estate, it must be in existence, and have been theretofore and at the date of the grant, used in connection with the land granted. It cannot thereafter be created or the physical condition of the property changed, in order that it may exist.

An easement by necessity only arises by way of an implied grant, when three certain concurrent conditions exist at the time of its alleged creation, viz: (1) A separation of the title; (2) That before the separation takes place the use which gives rise to the easement shall have been so long continued and so obvious as to show that it was meant to be permanent, and (3) That the easement shall be necessary to the beneficial enjoyment of the land granted *(14 Cyc.* 1168).

It has been held that no easement will be implied from a grant when it becomes necessary to change the physical condition of the property in order to

create the easement *(Roe v. Siddons,* 22 Q. B. D. 224). Here, the way would have to be carved out of the substance of appellant's estate by the extraction and removal of the rock. If the easement has to be created, it cannot be held to have been in contemplation of the parties when the grant is made.

Again, such easements must always exist on and be connected with the surface, and cannot be constructed underground *(Pearne v. Coal Creek Co.,* 18 S. W. 402).

Again, the property necessary to satisfy such claim would be absolutely taken from appellant for all purposes without any compensation, and in violation of the constitution of the United States. Such property is real estate, and can never pass as an easement.

We must, therefore, conclude that the rights claimed cannot pass as an easement by implication from a grant of the vein.

The only remaining theory upon which the right claimed could pass is by grant *which would be equal in dignity to a grant of the vein itself.* It would so far exceed the principles of grants to allow such right to pass by implication as a grant, that further consideration would seem superfluous.

(c) Only a statutory right is involved.

In considering and deciding the question concerning the construction of section 2322, we trust

the court will bear in mind that the right to go outside the vein as claimed by appellee is and can be so claimed only under the provisions of that section, and that all the rights granted by that section are purely statutory.

If the right claimed is not given by this section, it does not exist, no matter what equities exist or be urged by appellee to the contrary.

Judge Brewer in the *Del Monte* case, 171 U. S. 55, in passing upon a question as to whether or not extralateral rights could be claimed on a vein which passed through an endline and sideline of a location, used the following language:

> "We, therefore, turn to the following sections to see what extralateral rights are given, and upon what conditions exercised, and it must be borne in mind in considering the question presented that we are *dealing simply with statutory rights.* There is no showing of any local custom or rules affecting the right defined and prescribed by the statute, *and beyond the terms of the statute courts may not go. They have no power of legislation. They cannot assume the existence of any natural equity, and rule that by reason of such equity, a party may follow a vein into the territory of his neighbor and appropriate it to his own use. If cases arise for which Congress has made no provisions, the courts cannot supply the defect.*"

Judge Brewer further says that in determining rights under this section,

> "the question in the courts is, not what is equity, but what saith the statute."

(d) Appellant is entitled to a preliminary injunction under all circumstances.

The ultimate object of a preliminary injunction, preventative in its nature, is the preservation of the property or rights in controversy until the decision of the case on final hearing. It does not, in any legal sense, finally conclude the rights of the parties. Its sole object is the protection of the property, or the maintenance of the *status quo* until final hearing. It prevents a multiplicity of actions by the applicant, and protects its rights so as to avoid any thereof being gained by appellee under the doctrine of prescription.

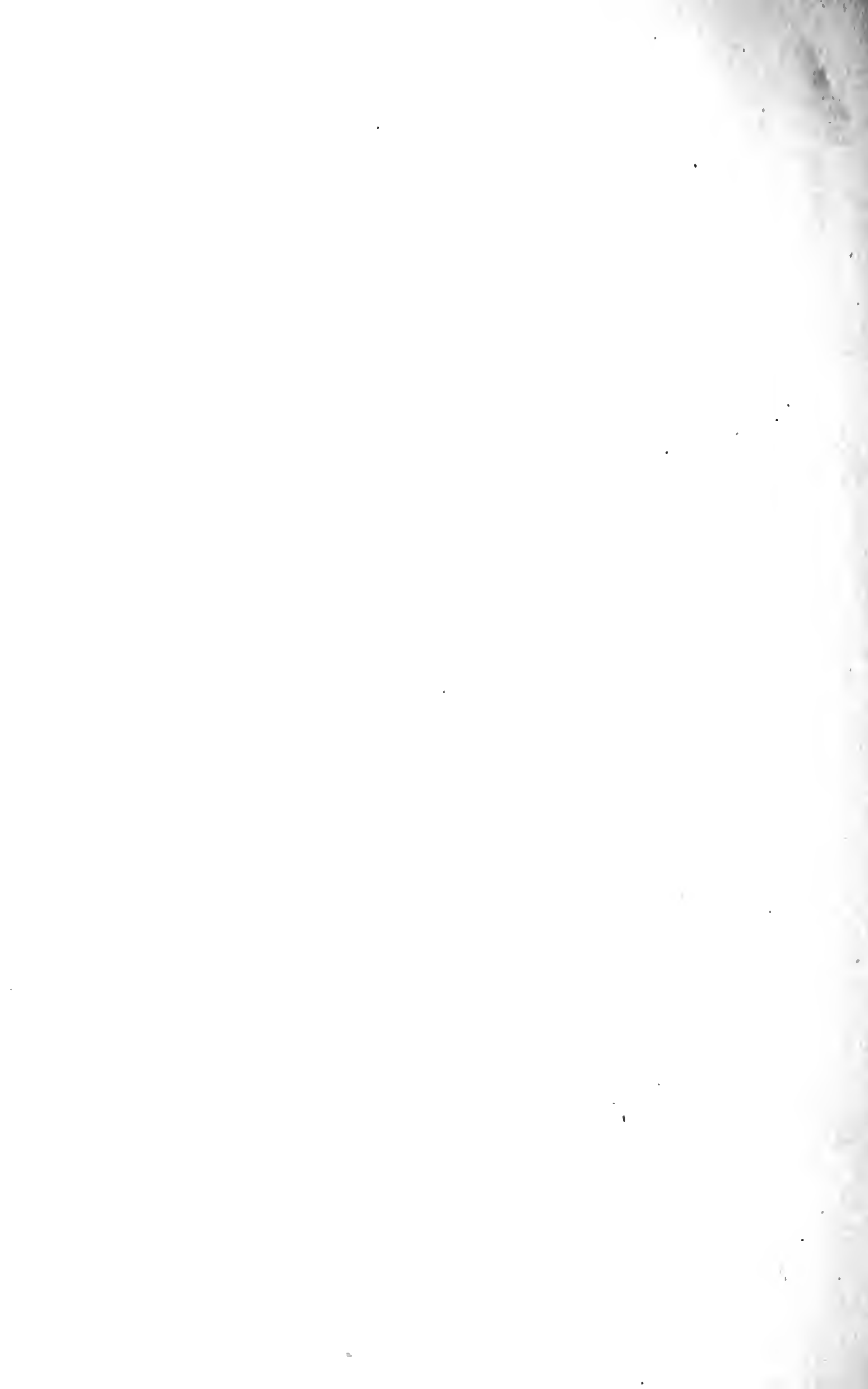
If by chance this court should be of the opinion that appellee has the right to go outside the vein then the question arises whether under the record herein it has shown any reasonable necessity so to do. We do not care to take up the time of the court in making further argument on the showing made, but we insist that from the Answer and the various affidavits filed by appellee it has made no showing that it will be reasonably necessary in the conduct of its mining operations on the vein extralaterally to go outside the boundaries of the vein. Allowing the most liberal construction of its showing, we submit that it only amounts to a claim on appellee's part that the act of going outside the boundaries of the vein will simply render its mining proposition more profitable and economical.

If there was any way in which the court could define and limit the places in which and the extent to which appellee might go outside the vein on the ground of reasonable necessity, their position in regard thereto would be more equitable. In my judgment, even though the court should hold that appellee is given the right to go outside the vein, the injunction should be granted with leave to the appellee to apply to the court whenever it desired to exercise that right, and ask for a modification of the injunction. Thus, each and every time the right would be sought to be exercised it would be under the direct control of the court.

Dated, San Francisco,
November 6, 1918.

Respectfully submitted,

John B. Clayberg,
Frank R. Wehe,
Bert Schlesinger,
Attorneys for Appellant.



No. 3205

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TWENTY ONE MINING COMPANY (a corporation),

Appellant,

vs.

ORIGINAL SIXTEEN TO ONE MINE, INC. (a corporation),

Appellee.

APPELLEE'S REPLY TO APPELLANT'S REPLY BRIEF.

WM. E. COLBY,
JOHN S. PARTRIDGE,
GRANT H. SMITH,
CARROLL SEARLS,
Attorneys for Appellee.

PERNAU-WALSH PRINTING CO.

No. 3205

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Twenty One Mining Company (a corporation), *Appellant,*

vs.

Original Sixteen to One Mine, Inc. (a corporation), *Appellee.*

APPELLEE'S REPLY TO APPELLANT'S REPLY BRIEF.

Not only is appellee vitally interested in the decision of the case at bar, but its outcome is of the utmost economic importance to the mining industry of the entire West. The filing of a brief on behalf of appellee in reply to the second brief filed by appellant would otherwise be a clear infliction upon an already overpatient court.

I.

THE BEARING ON THE QUESTION HERE INVOLVED OF WORK ALREADY PERFORMED BY APPELLEE OUTSIDE OF THE WALLS OF THE VEIN BUT IN ITS IMMEDIATE VICINITY.

Counsel for appellant have commented on the fact that at the oral argument one of the learned

judges inquired what bearing work already performed by appellee had on the determination of the question whether or not an injunction should issue preventing future work and they are correct in stating that the only bearing which such work can have is, in a sense, as a measure of the work contemplated by appellee in the future and to prevent which this injunction was sought by appellant. To make the situation clearer by a concrete illustration: An examination of the cross section diagram (p. 51 of the printed record) discloses the relation of the vein to the various workings and shows appellee's main working shaft sunk immediately beneath the vein throughout its lower extent and in close touch with it throughout. This shaft was driven slightly below the vein for several reasons, to wit: (1) because the vein was faulted in its upper portion, each fault dislocating the vein so that its lower extension was found dropped down with reference to the upper segment and it was believed the same condition would continue below; (2) because the vein flattened materially in dip below the 250 foot level and it was necessary to secure a more uniform grade, and (3) because the footwall rock immediately below the vein was firmer and safer and necessitated less timbering than if the shaft were run on the vein itself. All of these reasons contributed to make it reasonably necessary to drive this main working shaft in the footwall for this distance as is stated in the many affidavits filed in behalf of appellee and

none of which are contradicted by anything appearing in the record. It will be noted that at its present lower extremity this shaft is approaching the vein and is within five feet of the footwall of the vein. It is of the utmost importance that appellee should be able to continue this main working shaft on a uniform grade through this narrow width of intervening barren country rock until it reaches the vein again, otherwise the lower half of this main working shaft constructed at the expense of thousands of dollars will be a total economic loss and will have to be duplicated and appellee thus penalized to the extent of such expenditure. This, of course, is the result which appellant seeks to attain by this appeal.

Appellee will also have to construct other ore chutes in the hanging wall of the vein similar to the ore chute at the 300 level, if it is to operate its mine with reasonable economy. Appellee freely admits the necessity for these workings and that it will have to continue them if it is to operate its mine profitably and advantageously. Hence, it welcomes a decision by this court which will announce the law applicable to such workings under similar circumstances.

II.

THE STATUTE GRANTING THE EXTRALATERAL RIGHT GRANTS NOT ONLY THE POSSESSION BUT THE ENJOYMENT OF THE VEIN.

Answering opposing counsel's discussion of Proposition I (p. 2 of appellant's reply brief), we

evidently failed in our opening brief to point out clearly enough to convince opposing counsel that the right of possession of a thing and the right of enjoyment of a thing are two very distinct rights. A trustee may have possession of property but he may have no right of enjoyment of that property. But if the right of enjoyment is distinctly granted in so many words, then the grantee may do everything which is reasonably necessary to render effective this right of enjoyment.

Appellant's discussion numbered II found on pages 4-5 of its reply brief is also answered by the mere statement that appellee is not attempting to engraft on or add any new rights to the statute for the statute distinctly grants the specific right of reasonable enjoyment here contended for.

Appellant also fails to recognize this same distinction in its discussion of the *Drum Lummon* case, found on pages 6-7 of its reply brief. Not only does the statute give the locator the vein on its dip, but as Judge Brewer said, it also gives him "the right to pursue a vein". A grant of fish or game or any other specific thing that may be found upon another man's land in and of itself is of no value if it be not accompanied by a reasonable right to go upon such land and possess and enjoy the thing granted. And when opposing counsel argue, as they have, that if a vein pinches down to a knife blade or is faulted or otherwise dislocated locally so that it is impossible to physically possess and enjoy that vein without cutting into country rock and that,

therefore, the right granted by the statute is totally defeated and destroyed, they are ignoring the great mass of authority on the subject of grants by implication that has been piled up for more than two centuries past.

III.

THE EXTRALATERAL GRANT CONTAINED IN THE MINING STATUTE IS AS COMPLETE AND EFFECTIVE A GRANT AS WOULD BE THE SAME GRANT BETWEEN PRIVATE PARTIES.

In discussing this proposition on pp. 9-11 of appellant's reply brief, opposing counsel avoid committing themselves to the idea that the title to a mining location is virtually founded on a grant from the federal government. In our opening brief, we have already cited *Gwillim v. Donnellan,* 115 U. S. 45, 49, to the effect that a location "has the effect of a grant by the United States of the right of present and exclusive possession". See also same language in *Manuel v. Wolff,* 152 U. S. 505, 510-511.

In *O'Connell v. Pinnacle Gold Mines*, 9th C. C. A.; 140 Fed. 854, 855-6, Judge Gilbert points out that "in the mining laws the *grant*" gives to the locator "a higher estate than is given to the settler or locator under any other of the land laws". The Court of Appeals of the 8th Circuit has said "the title to a well-located mining claim * * * rests upon a statutory grant" (*Oscamp v. Crystal River M. Co.,* 58 Fed. 293, 296; and "is confirmed by ex-

press statutory grant" (*Burns v. Clark,* 133 Cal. 534, 635.

But opposing counsel would differentiate between a private grant and a statutory grant, urging that the former carries rights by implication which the latter does not. They ignore entirely the authorities cited on pages 13-17 of appellee's opening brief which lay down the general rules of interpretation of this public mining grant, to wit:

> The locator should receive the full benefit of the statute in its true spirit and intent * * * and the general principle of interpretation should be to preserve in all cases the essential right given by the statute;
>
> The disposal of the mines and minerals is the primary purpose of the statute and in its interpretation this must be recognized and given effect, and
>
> Questions of doubtful construction are not to be resolved against it, etc.

It is unthinkable that the sovereign power should grant a right, which the courts say should be liberally construed, and that such grant should not carry with it the same incidental rights which are ordinarily enjoyed by grantees holding under private grants.

As Judge Hallett, one of our great Western mining jurists, said in *Harris v. Equator Mining Company,* 8 Fed. 863, 866:

> "In general, we apply to mines in the public lands the rules applicable to real property * * * "

If this be good law, and it has both logic and precedent to support it, then there is no valid reason why the same rules which govern in the mining of veins severed from the surface under private grants should not control in the case of grants acquired by a compliance with the mining statutes.

That statutory enactments and grants are to be construed so that they shall be held to confer by implication everything necessary and requisite to make the grant effectual or requisite to accomplish the object of the grant see *Lewis' Sutherland on Statutory Construction* (2nd ed.):

> "Statutes are not, and cannot be, framed to express in words their entire meaning. They are framed like other compositions to be interpreted by the common learning of those to whom they are addressed; especially by the common law, in which it becomes at once enveloped, and which interprets its implications and defines its incidental consequences. That which is implied in a statute is as much a part of it as what is expressed." (p. 933)
>
> "Wherever the provision of a statute is general, *everything which is necessary to make such provision effectual is supplied by the common law and by implication.* A grant of lands from the sovereign authority of a state to individuals to be possessed and enjoyed by them in a corporate capacity confers a right to hold in that character. A legislative grant made to an alien, by necessary implication confers the right to receive and enjoy without prejudice on account of alienage." (p. 939)
>
> "*When a statute gives a right* or imposes a duty, *it also confers by implication the power*

> *necessary to make the right available* or to discharge the duty." (p. 947)

> "What is clearly implied is as much a part of the law as what is expressed."
>
> *Luria v. United States,* 231 U. S. 9, 24.

> "What is implied in a *statute,* pleading, contract, or will is as much a part of it as what is expressed."
>
> *United States v. Babbitt,* 66 U. S. 55, 61.

Same language used in *Buckley v. United States,* 86 U. S. 37, 40, construing a private instrument, to which the court adds:

> "Human affairs are largely conducted upon the principle of implications."

It will be noted that no distinction is made in these cases between statutes and private instruments, for they are classed together.

Any other conclusion would do violence to plain, everyday common sense, and opposing counsel's statement found on page 11 of their reply brief "that the rule of implication applied to private grants cannot on principle or reason have any applicability to locations made under the Mineral Act" is, we respectfully submit, diametrically opposed to principle, reason and precedent.

To paraphrase the language of the Supreme Court of the United States (*Ex parte Yarbrough,* 110 U. S. 651, 658; *South Carolina v. United States,* 199 U. S. 437, 451) used in similar cases involving an interpretation of constitutional powers:

> 'It is an old argument often heard, often repeated, *and in this court never assented to,* that when the question of the exercise of a necessary incidental right arises, the advocate of the existence of such right must be able to place his finger on the words which expressly grant it.'

Therefore, the authorities cited on pages 23-28 of appellee's opening brief, including that of the Court of Appeals of the 8th Circuit, distinctly holding that the grant of the right to a vein carries with it by implication the incidental right of cutting into and removing the strata overlying and underlying the vein and all other incidental rights reasonably necessary for the beneficial use and enjoyment of the vein, are directly in point.

IV.

THE COURT BELOW EXERCISED DISCRETION IN REFUSING TO ISSUE AN INJUNCTION.

At top of page 12 opposing counsel in their reply brief state that counsel for appellee concede that "the court below did not exercise any discretion in arriving at his decision", etc. Such a concession has never been made. The court below had before it the bill of complaint and the answer, the Sizer affidavit and the counter-affidavit of Connor filed long before the hearing on the application for a preliminary injunction and it exercised full discretion in refusing to issue the injunction *pendente lite.*

Counsel on page 13 of their brief seek to evade the force of the *St. Louis Trust Co. v. Galloway Coal Co.* case by stating that a final hearing was there involved and no preliminary injunction was involved. In our humble opinion this fact makes this authority holding that the public interest should always be kept in mind, infinitely more powerful. If the public interest is to have weight on a final determination then there is all the greater reason why it should be given every consideration on a preliminary hearing, especially where the party seeking the injunction cannot possibly be injured to the extent of one cent's worth of actual damage pending the litigation, if the injunction be refused.

V.

APPELLANT'S MOTIVES.

Appellant's motives in attempting to enjoin appellee from conducting reasonable mining operations beneath the surface of appellant's mining claims are unmistakable. At the top of page 17 of their reply brief counsel frankly admit that appellant's purpose is to make the mining of the vein, which is the property of appellee, so unprofitable that appellee's investment would be destroyed and no more capital would consequently be invested because the returns would not justify further operations. Counsel are mistaken in representing as they do on the same page that appellee claims the right

> "to go underneath the surface of our [appellant's] premises, and do with it exactly as they pleased under the pretense that their acts were reasonably necessary to the economical mining of the vein".

Such a statement is a gross perversion of appellee's contention. All that appellee claims is a reasonable latitude in mining in and upon its vein in a common sense manner such as is customary wherever mining is carried on and it is supported in its claim of this incidental and implied right to cut into the neighboring overlying and underlying strata by both reason and eminent authority.

VI.

THE INCIDENTAL RIGHTS HERE INVOLVED ARE APPURTENANCES.

Counsel thoroughly misconceive the nature of the incidental and implied rights accompanying a specific grant such as those here involved. The authorities cited on pages 23-28 of appellee's opening brief should be in themselves sufficient to satisfy anyone that *such incidental rights exist whatever they may be termed.* They are not, however, classified as easements as counsel would lead us to infer from their discussion found on pp. 19-20. They are incidental or appurtenant rights, though in some cases called "secondary easements", which is a correct designation in some instances, for easements often pass by implication as appurtenant to the main grant. While the proposition that such rights are appurtenances is elementary, since

counsel has raised the question, it may be well to call attention to the following definitions of appurtenances: "appurtenances" include such incidental rights to land as "are reasonably necessary for its proper *enjoyment*" (*27 Cyc.* 1143) the "right to work mines" being included (*id.* note 19).

> "Generally anything necessary to the *enjoyment* of the land".
>
> *4 Corpus Juris,* 1467, note 33 (c).

> "The transfer of a thing transfers all its incidents and appurtenances".
>
> *McShane v. Carter,* 70 Cal. 310;
>
> *Cal. Civil Code,* Sec. 1084.

> "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit" * * *.
>
> *Cal. Civil Code,* Sec. 662.

Also see the annotations under this section in Kerr's Codes of California, among which is the statement that a

> "mining right granted carries with it by implication *and without express grant* whatever is necessary to beneficial enjoyment", citing authorities.

That it is not necessary to specify these incidental and appurtenant rights in the grant see Sec. 1084, *Cal. Civil Code.*

They pass with the thing granted "without the words *cum pertinentiis* or any such like words".

> *Sheppard's Common Assurances* (Touchstone, 1648 A. D.), p. 89.

"These incidental rights of the miner, *which are appurtenant to the grant of the mineral rights,* are to be gauged by the necessities of the particular case, and therefore vary with changed conditions and circumstances. He may occupy so much of the surface, adopt such machinery and modes of mining, and establish such auxiliary appliances and instrumentalities, *as are ordinarily used in such business, and may be reasonably necessary for the profitable and beneficial enjoyment of his property.* But he is not limited, as we have already said, to such appliances as were in existence when the grant was made, but may keep pace with the progress of society and of modern invention".

Williams v. Gibson, (Ala.) 4 Southern 350.

VII.

CONCLUSION.

Counsel for appellant are evidently not as confident of their position as they might be, for on page 22 of their reply brief they concede the possibility that this court may decide "that appellee has the right to go outside the vein" and in that event the question of a "reasonable necessity" for so doing would become important. They claim that appellee has made no showing of the existence of a reasonable necessity. In the face of the *uncontradicted* and numerous affidavits filed by appellee establishing this fact, such a statement is unworthy of reply. They claim that the showing made by appellee is merely that the vein can be mined more economically and profitably by means of such work-

ings. It is unnecessary to cover this ground again and show that reasonable necessity includes economic and profitable operation (see authorities cited on pages 23-32 of appellee's opening brief. These authorities could be multiplied indefinitely).

It is quite evident that appellant desires to put appellee to as much trouble and annoyance and expense as possible and hence the suggestion found on page 23 of appellant's reply brief that "even though the court should hold that appellee is given the right to go outside the vein, the injunction should be granted, etc". Think of it! It is virtually a claim that even though the grounds for an injunction do not exist, yet an injunction should be issued. And for what purpose? So that appellant might exercise constant espionage and control over appellee's operations. If appellant is justified in making this preposterous claim, then, every time an apex proprietor crosses the vertical side boundary of his claim and commences to mine extralaterally, the adjoining owner of the overlying surface would be entitled to the issuance of a similar injunction. And what a burden would be imposed on the courts if such a startling doctrine should prevail! As was said in a case involving a somewhat similar situation where the court refused to grant an injunction:

> "The evidence shows there is no rule by which a court can specify in what manner the work shall be done, how much coal shall be removed, or what size the rooms shall be, as all these matters depend upon the conditions as

they are found in the different portions of the mine * * *

"It is largely a question of engineering, and courts will encounter great difficulty in assuming, and will only in rare cases, where the remedy at law is so inadequate as to render such course necessary, assume charge of the operation of such work and direct the manner in which it shall be done."

Lloyd v. Catlin Coal Co., 71 N. E. (Ill.) 335, 339.

Extralateral mining wherever carried on, and that means throughout the entire West, will be profoundly and seriously affected if appellant's contention prevail. With every confidence that this court will never sanction so severe a blow to the mining industry, this brief is respectfully submitted.

Dated, San Francisco,
November 14, 1918.

WM. E. COLBY,
JOHN S. PARTRIDGE,
GRANT H. SMITH,
CARROLL SEARLS,
Attorneys for Appellee.

No. 3206

United States
Circuit Court of Appeals
For the Ninth Circuit.

W. P. FRICK,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

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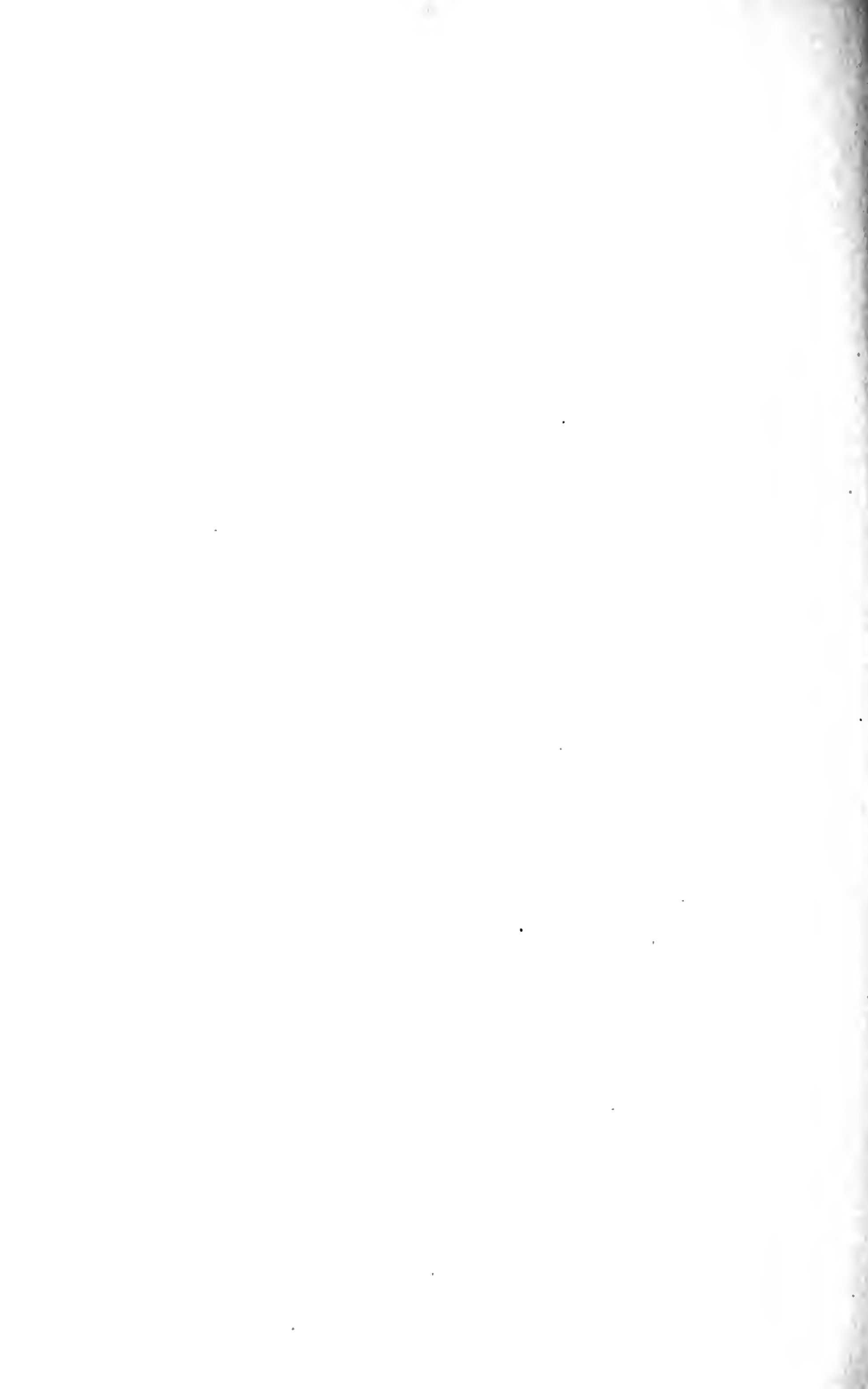

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. P. FRICK, JOHN DOE, RICHARD ROE, and ALBERT DOE,

Defendants.

Bill of Complaint.

To the Judges of the Circuit Court of the United States, for the Ninth Circuit, Northern District of California:

George W. Wickersham, Attorney General of the United States, and Robt. T. Devlin, United States Attorney for the Northern District of California, for and on behalf of the United States of America, complainant, bring this bill in equity against W. P. Frick, John Doe, Richard Roe and Albert Doe, all inhabitants and residents of the State and Northern District of California, and hereby made defendants to this bill of complaint, and thereupon your orators complain and say:

I.

That heretofore, to wit, on August 23, 1907, one Bolling C. Robertson, now deceased, under the provisions of the Act of Congress of the United States entitled "An Act for the Sale of Timber Lands in the States of California, Oregon and Nevada, and in Washington Territory," approved June 3, 1878, and the amendments thereof, and under the regulations of the Department of the Interior of the United

States made and filed in the United States Land Office at Sacramento, California, his certain application to purchase all the following described public lands of the United States, situated in the district of lands subject to sale at Sacramento, California: [1*]

> Lots 3, 4, and 5; the southeast quarter of the northwest quarter (SE.¼ NW.¼) of Section Six, township eight north, range fourteen east, M. D. M.

That the said application was regular in its form, and was duly subscribed by said Bolling C. Robertson as applicant, was duly verified by the oath of the said Bolling C. Robertson as applicant before the Register of the said United States Land Office at Sacramento, California, and was duly received, accepted and filed by the officials of the said United States Land Office as and for an application to enter said lands under the said timber laws of the United States; and that at said time a duplicate of said application was by said Bolling C. Robertson duly made, subscribed, sworn to and filed with the said Register of the United States Land Office at Sacramento.

II.

That in the said application, the said Bolling C. Robertson did designate by legal subdivisions, the particular tract of land he desired to purchase, and he did therein set forth among other statements that he had personally examined said land; that the said was unfit for cultivation, and that the same was val-

*Page-number appearing at foot of page of original certified Transcript of Record.

uable chiefly for its timber; that it was uninhabited, and that it contained no mining or other improvements, and that as he, the said Bolling C. Robertson verily believed, the said land did not contain any valuable deposits of gold, silver, cinnabar, copper or coal, and that the Bolling C. Robertson had made no other application under the said Act; that Bolling C. Robertson did not apply to purchase the said land on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he had not directly or indirectly made any agreement or contract in any way or manner, with any person or persons whatseoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself. [2]

III.

That at the time of the filing of the said application for the purpose of perfecting said application said Bolling C. Robertson as applicant aforesaid, further made and filed in the said United States Land Office his certain nonmineral affidavit; that said nonmineral affidavit was regular in form, was duly subscribed to by said Bolling C. Robertson, was duly sworn to before the Register of the said United States Land Office at Sacramento, California, and was duly received, accepted and filed by the officials of the said United States Land Office, and the officers of the said Department of the Interior as a regular and sufficient nonmineral affidavit under the law and the rules and regulations requiring the filing of a

nonmineral affidavit in connection with the making of an application to enter said lands under the said timber laws of the United States. That in said affidavit, said Bolling C. Robertson declared, among other things, that he was well acquainted with the character of said land and each and every legal subdivision thereof; that he had frequently passed over the same; that to his personal knowledge there was not, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead or copper, or any deposit of coal; furthermore, he declared that no portion of said land was claimed for mining purposes under the local customs or rules of miners or otherwise, and that no portion of said land was worked for mineral during any part of the year by any person or persons that said land was essentially nonmineral and that the said application therefor was not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for timber purposes.

IV.

That upon the filing of the said application and said nonmineral affidavit, the said Register of the said United States [3] Land Office, in compliance with law, did give notice that said applicant and affiant had filed in his office his sworn statement and application for the purchase of the land as hereinbefore described, and would, at a time and place fixed in said notice, to wit, the 28th day of October, 1907, offer proof to show that the land sought was more valuable for its timber and stone than

for mineral purposes, and would establish his claim to said land before the Register of said United States Land Office at Sacramento, California, at said time and place; that said notice was in accordance and in compliance with law duly published in a newspaper for the required length of time.

V.

That at the time and place so fixed in said notice for the hearing of said application, the said Bolling C. Robertson, as applicant, did appear as a witness in his own behalf and did produce W. P. Frick, one of the defendants herein, and one Ezra Taylor, as witnesses to testify in his, said Bolling C. Robertson's behalf; that said Bolling C. Robertson and the said witnesses were, by the said Register of the said United States Land Office at Sacramento, California, before whom the said matter was to be heard, duly and regularly sworn to testify truthfully concerning all matters about which they might be questioned, relative to the said application of the said Bolling C. Robertson, and to the character of said land.

That thereupon questions were regularly propounded to the said Bolling C. Robertson and to his said two witnesses, and in answer to such questions at said hearing the said Bolling C. Robertson and his said two witnesses did testify in part, as follows: That the said Bolling C. Robertson had made application for said land; that they were intimately acquainted with said property and every part thereof, and had been over the property and had made a careful examination of the same; that the said land

was not and would not be fit for cultivation; that it was steep, [4] rugged and rocky and thin soiled; that it was unoccupied and unimproved; that there were no indications whatever of any salines, deposits of gold, silver, cinnabar, copper or coal thereon, and that the said land was chiefly valuable for its timber, and that no other person had any interest in said entry, land or timber than himself.

VI.

That the said Bolling C. Robertson did testify and did cause his said witnesses, one of whom being W. P. Frick, a defendant herein, to testify to the said statements last hereinbefore particularly specified; that all of said statements made by said witnesses and said Bolling C. Robertson were, and each of the same was, as the said Bolling C. Robertson well knew at the time he made and caused the same to be made, false; that not only said statements, but also the said declarations of said Bolling C. Robertson in his said application, and his said nonmineral affidavit were false and were made with intent to defraud the United States, and the same did in fact defraud the United States.

VII.

Referring to the said declarations contained in the said testimony, application and nonmineral affidavit of said Bolling C. Robertson, and the declarations in the said testimony of said witnesses, which are hereinbefore charged to have been wholly false and to have been made with the intent to defraud the United States, your orators aver that such declarations were false in this: That the said land has al-

ways been more valuable for minerals than for timber; that for a long time prior to the entry of said Bolling C. Robertson upon said land, and subsequent thereto, and at the time of the purchase of said land by W. C. Frick as hereinafter set forth, there were located on said land gold quartz and placer mining claims owned by one L. Parker of Grizzly Flat, California, the location of which claims appeared upon the records in the office of the [5] County Recorder of El Dorado County, California; that on lot number 4 of said land there are two gold quartz veins exposed and several thousand dollars' worth of mining improvements owned by said Parker. That said improvements owned by said Parker consist of several hundred feet of trenching from ten to twenty feet deep and from twenty-five to one hundred feet wide, and a log cabin in good condition; that leading to said claims there is over a mile of ditching used to carry water to said claim; that samples of said quartz upon being pounded and washed show good profits; that the said land has always been well-known throughout the surrounding community as mineral land; that said improvements hereinbefore set forth and said outcroppings of quartz and mineral indications on said land were on said land and in full view to the human eye on and before the time of the entry by said Bolling C. Robertson and at the time of the issuance of patent to him and have ever since continued to be in existence and in evidence thereon as aforesaid.

VIII.

That the said testimony of the said Bolling C.

Robertson and of his said witnesses was reduced to writing, and that the same was thereupon subscribed and sworn to by the said Bolling C. Robertson and his said two witnesses in the form of affidavits, containing questions and answers in accordance with the rules and regulations of the Department of the Interior of the United States; that after the said testimony was reduced to writing, the said Bolling C. Robertson caused the same to be filed in said United States Land Office at Sacramento, California.

That said Bolling C. Robertson paid the fees required by law and also all moneys required by law for the purchase of said land, and the Receiver then in office did duly and regularly execute to said Bolling C. Robertson a Receiver's receipt therefor, dated October 28, 1907, and did thereby duly acknowledge the receipt of said moneys as being in full for the land above mentioned and described; that said receipt was duly and regularly signed by the [6] proper officer who was then and there the Receiver of the United States Land Office at Sacramento, California; that a duplicate of said receipt was at the said time and place of making the same as aforesaid, duly delivered by said Receiver to the said Bolling C. Robertson.

That said Bolling C. Robertson complied with all the forms of law and the rules and regulations of the Department of the Interior required to obtain a patent to the whole of said land hereinbefore described, under the Act of Congress hereinbefore referred to, and that the said proofs and testimony

offered by him were accepted by and filed with, the said officials of the United States Land Office at Sacramento, California, and by the officials of the Department of the Interior of the United States, as being in all respects regular and sufficient and true, and as establishing the right of the said Bolling C. Robertson to have issued to him a patent to the said lands; and in accordance with the rules and regulations of the Department of the Interior of the United States, the complainant herein, by and through its proper officials, duly and regularly executed and issued upon the 6th day of April, 1908, its patent to the said tract of land hereinbefore described, to the said Bolling C. Robertson, under the Acts of Congress hereinbefore referred to, which said patent purported to convey to the said Bolling C. Robertson the title to the said lands.

That the complainant, and all and each of its officers, accepted said proofs without any knowledge or notice of their falsity, or of the fraud herein set out as aforesaid, and complainant, prior to the issuance of said patent, had no notice or knowledge of said fraud, but on the contrary believed the said statements of said Bolling C. Robertson and his said two witnesses, to be true, and believed that the said application was made in good faith. [7]

IX.

That the said false declarations of said Bolling C. Robertson in his said application and nonmineral affidavit and testimony, and the said testimony of the said two witnesses, were made for the purpose of obtaining, and he did thereby obtain, from the

United States, the said patent to the said land, when in truth and in fact he, the said Bolling C. Robertson, had no right whatever to the land, and had not sought to enter the same for the purpose of securing the timber thereon, but for the minerals found therein, and that said statements that the said Bolling C. Robertson applied to purchase said land for timber, were false and untrue; that all of the said false statements were material and had the same not been made, and had not the same been relied upon and believed to be true by the complainant herein, and by its officers and agents authorized to issue the said patent, the said patent would not have been so obtained by the said Rolling C. Robertson.

X.

That subsequent to the 28th day of October, 1907, to wit, on or about the 22d day of September, 1909, the said Bolling C. Robertson made, executed and delivered to W. P. Frick, one of the defendants herein, a grant, bargain and sale deed of conveyance, purporting to transfer all of said lands hereinbefore described to the said W. P. Frick. That said deed of conveyance was on the said 22d day of September, 1909, duly recorded in the office of the County Recorder of the county of El Dorado, State of California, in Book 73 of Deeds, page 207. That ever since the said execution of said deed of conveyance the said defendant W. P. Frick has claimed and has held the title thereby conveyed to said real property herein described and does now claim to own the same and the whole thereof.

That the said defendant W. P. Frick claims to have

purchased [8] said property and to have received therefor the said deed of conveyance, which deed is the only evidence of title that said defendant W. P. Frick has ever procured from any person whatever.

That the said defendant W. P. Frick lived for a number of years prior and subsequent to the year 1900 in the vicinity of the property herein described; that he was engaged in the pursuit of mining in the neighborhood of the said property; that he has passed and repassed over this property and along a certain road which runs close to said property, for a number of years; that he is now, and always has been, well acquainted with the property herein described and has known for several years prior to the entry of Bolling C. Robertson that there were located on said property the claims of said L. Parker, and that said Parker was mining thereon and that said Parker had improved and was improving the property for the purpose of conducting his mineral operations thereon, and that said property was mineral property. That said defendant W. P. Frick was one of the witnesses produced for and on behalf of the said Bolling C. Robertson at the said hearing before the Land Office officials on the 27th day of October, 1907, aforesaid; that said defendant knew and has always known that the said entry made by the said Bolling C. Robertson was made in bad faith through fraud on the part of said Bolling C. Robertson as aforesaid and that this defendant W. P. Frick became the purchaser of said property in bad faith and that he had full knowledge of all of the equities

and rights of this complainant in and to the said property.

XI.

That the complainant does not know the true names of the defendants John Doe, Richard Roe and Albert Doe, and therefore it sues them by the fictitious names aforesaid, and prays that when their true names are discovered, they may be inserted herein, and this bill may be amended accordingly. [9]

XII.

That subsequent to the execution of said deed to the said W. P. Frick by the said Bolling C. Robertson the said Bolling C. Robertson died in the county of El Dorado, State of California.

XIII.

That the said patent so executed and issued to the said Bolling C. Robertson, deceased, constitutes a cloud upon the title of this complainant thereto, and hinders and obstructs it in its use of said land; that defendant W. P. Frick, notwithstanding the fraud practiced upon the complainant by Bolling C. Robertson, deceased, as hereinbefore alleged, by virtue of said patent and said deed, claims to have some interest in said land; that said claims of said defendant W. P. Frick, are adverse to complainant and are wholly without right; that in truth and in fact the complainant is entitled to the said land and the whole thereof, free and clear of any claim or claims of the said defendant W. P. Frick.

That all of the defendants herein claim an interest in the said patent and said lands, adverse to complainant, but said claim is wholly without right.

XIV.

And lastly, in support of the averments of this bill, your orators beg leave to refer to the aforesaid application of said Bolling C. Robertson, deceased, and to all of the affidavits, papers, documents, depositions, receipts, certificates and proceedings had in the matter of the making of said entry and application to purchase, in so far as the same may relate to the issuance of the said patent, and to the records of the General Land Office of the United States and of the Department of the Interior of the United States, or to certified copies thereof.

Forasmuch as your orators can have no adequate relief, except in this court, and to the end, therefore, that the defendants [10] may, if they can, show why your orators should not have the relief prayed, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being hereby expressly waived.

WHEREFORE, your orator prays relief and decree of this Honorable Court that the patent to the land in this bill of complaint described, as issued by complainant to said Bolling C. Robertson, be recalled and canceled; that the money paid to the United States by said Bolling C. Robertson as the purchase price of said land, be forfeited to the United States, and that the defendants and all other persons claiming under them, be forever estopped

from asserting any right, title or interest to said land, and that the land described in said patent and this bill of complaint be declared public land of the United States, and that said patent and said deed be declared null and void; and that this complainant may have such other and further relief as may seem to accord with the principles of equity.

May it please the Court to grant to the United States the writ of subpoena issuing out and under the seal of this Honorable Court, directed to the defendants W. P. Frick, John Doe, Richard Roe, James Doe, Albert Doe, on a day certain to be named therein, to be and appear before this Honorable Court to answer all and singular the premises, and to stand and abide by such other orders, directions and decrees as may be made therein.

GEO. W. WICKERSHAM,
Attorney General of the United States.
ROBT. T. DEVLIN,
United States Attorney for the Northern District of California,
Solicitors for Complainant.

[Endorsed]: Filed Oct. 27, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [11]

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. P. FRICK, JOHN DOE, RICHARD ROE, and ALBERT DOE,

Defendants.

(Answer of the Defendant W. P. Frick.)

The defendant W. P. Frick for answer to the complainant's complaint on file herein,—

I.

Denies that all or any of the statements alleged to have been made by the said Bolling C. Robertson and his witness therein named, or either of them, as set out in paragraph V of the complainant's complaint were false. Denies that all or any of the statements, or declarations, or either of them, made by the said Bolling C. Robertson in his said application and his said nonmineral affidavit, or either of them, were false, and were or were made with the intent to defraud the United States, or any other person, and that or that the same did in fact defraud the United States, or any other person.

II.

Denies that the said land has always been more valuable for minerals than for lumber. Denies that for a long time prior to the entry of the said Bolling C. Robertson upon said land, and subsequently or

subsequently thereto, and at or at the time of the purchase of said land by the defendant W. P. Frick, as is in complainant's bill of complaint set forth, there were located on said land gold quartz and placer, or gold or quartz or placer mining claims, or any claims, owned by one L. Parker of Grizzly [12] Flat, California, or any other person, the location of which claims appeared upon the records in the office of the County Recorder of El Dorado County, California. Denies that on lot number 4 of said land there are two, or any, quartz veins exposed and several or several thousand or any dollars' worth of mining improvements owned by said Parker, or any other person. Denies that said improvements owned by said Parker, or any other person, consist of several hundred feet of trenching from ten to twenty feet deep, and from or from twenty-five to one hundred feet wide, or any other distance wide, and a or a log cabin in good or any condition. Denies that leading to said claims, or any of them, there is over a mile or any ditching used to carry water to said claim or any claim. Denies that samples of said quartz upon being pounded and washed showed good or any profits. Denies that the said land has always been well known, or at all known, throughout the surrounding community as mineral land. Denies that the said improvements hereinbefore set forth, or any of them, and or said outcroppings of quartz and mineral, or quartz or mineral, indications on said land were on said land and in, or in, full view to the human eye on and before, or on or before the time of the entry by said Bolling C. Robertson and at or at

the time of the issuance of patent to him, and have or have ever since continued to be in existence and in or in evidence thereon as aforesaid.

III.

Denies that there was any fraud of any kind, or any false statements of any kind in any of the proofs presented to the United States Land Office at Sacramento, California, or any other place, in connection with the application for a patent to said lands in complainant's complaint described, or in the granting of the patent thereon. [13]

IV.

Denies that the said Bolling C. Robertson did not seek to enter the said lands for the purpose of securing the timber thereon, but that or that he sought to enter the same for the purpose of securing the minerals thereon, and that said statements that the said Bolling C. Robertson applied to purchase said land for timber were false and untrue, or false or untrue.

V.

Denies that ever since the said execution of the deed in paragraph 10 of complainant's complaint referred to that the said defendant W. P. Frick has claim and has or has and has or has held the title conveyed by said deed to said real property in complainant's complaint described, and does claim or does now claim to own the same and the whole or the whole thereof, and avers that at the present time and for a period sometime prior to the filing of this bill of complaint against the defendant W. P. Frick the said defendant has had no interest whatsoever in or

to the real property, or any part thereof, described in complainant's complaint.

VI.

Denies that he had known for several years, or any years prior to the entry of Bolling C. Robertson, that there were located on said property the claims of said L. Parker, or any other person, and that or that the said Parker was mining thereon, and that or that the said Parker had improved and was or was improving the property for the purpose of conducting his mineral or any operations thereon, and that or that said property was mineral property. Denies that said defendant knew and has or has always, or at all, known that the said entry made by the said Bolling C. Robertson was made in bad faith through fraud on the part of said Bolling C. Robertson, as in complainant's complaint charged, and that or that defendant Frick became the purchaser of said property in bad [14] faith, and that or that he had full or any knowledge of or any of the equities and rights, or equities or rights of this complainant in and to, or in or to the said property, or any part thereof.

VII.

Denies that the said patent so executed and issued, or executed or issued to the said Bolling C. Robertson, deceased, constitutes a fraud upon the title of this complainant thereto, and hinders or hinders, and obstruct or obstructs it in its use of said land. Denies that the defendant W. P. Frick notwithstanding the fraud practiced upon complainant by Bolling C. Robertson, deceased, as is in complain-

ant's complaint alleged, or at all, by virtue of said patent and said deed or deed, claims to have some interest in said land, and denies that said Frick claims any interest whatsoever in or to said land. Denies that in truth and in fact, or in truth or in fact the complainant is entitled to the said land and the whole thereof, or the whole thereof, free and clear, or free and clear of the claim or the claims of any person whatsoever.

WHEREFORE, this defendant having fully answered the complainant's complaint prays that the complainant take nothing as against him by virtue thereof, and that he may have his costs in this behalf expended.

JORDAN & BRANN,
Solicitors for Defendant W. P. Frick.

Rec'd a copy of within answer this Oct. 8, 1915.

JNO. W. PRESTON,
U. S. Attorney.

[Endorsed]: Filed Oct. 8, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

IN EQUITY.

UNITED STATES OF AMERICA,
Complainant,

vs.

W. P. FRICK, JOHN DOE, RICHARD ROE and ALBERT DOE,
Defendants.

Final Decree.

This cause came on to be heard at this term, and was argued by counsel, and

It appearing to the Court that a bill in equity was filed in this court on the 27th day of October, 1911, against the defendants, W. P. Frick, John Doe, Richard Roe and Albert Doe, and that subpoena was duly issued; that thereafter said defendant Frick filed his answer to said bill of complaint, the fictitious defendants having been dropped out, and

It further appearing, and the Court finds that the patent to the following described land, to wit: Lots 3, 4 and 5 and the Southeast quarter (SE. 1/4) of the northwest quarter (NW. 1/4) of Section 6 in township 8 north of range 14 east, M. D. M., containing 199.26 acres, was fraudulently procured by Bolling C. Robertson with the aid and assistance of the defendant W. P. Frick; that the said Frick is not and was not a *bona fide* purchaser of said land

for value without notice of fraud perpetrated upon complainant, and

It further appearing that on the 23d day of May, 1911, the said defendant, W. P. Frick, deeded the said land to the California Door Company, which was a *bona fide* purchaser for value, and that the cancellation of said patent has become impracticable since said suit has been brought, and

It further appearing that the value of said land at the [16] date of the execution of said deed, was $32.50 per acre, and that the complainant is entitled to the value thereof, and the Court being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that the said complainant, the United States of America, do have and recover of and from the said defendant, W. P. Frick, the sum of Six Thousand Four Hundred and Seventy-five Dollars and Ninety-five Cents ($6,475.95), together with the costs incurred in the suit.

Aug. 7, 1917.

WM. C. VAN FLEET,

Judge of the United States District Court, Northern District of California.

[Endorsed]: Filed and entered August 7, 1917. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 15,388.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. P. FRICK et al.,

Defendants.

Opinion.

Filed July 30, 1917.

J. W. PRESTON, United States Attorney, and ED. F. JARED, Assistant United States Attorney, for Complainant.

JORDAN & BRANN and RICHARD LYMAN, for Defendant.

VAN FLEET, District Judge.

This is a bill by the United States seeking equitable relief on the ground of fraud, alleged to have been committed in the procurement of a patent to certain public lands therein described, under an application to purchase them as timber lands, the substance of the material averments being that the application was made by one Robertson, from whom the defendant Frick [18] purchased; that the fraud consisted in false representations and statements made in the sworn application and in testimony given before the land office by both Robertson and Frick—the latter appearing as a witness

therein, on behalf of the applicant—as to the character and state of the lands, in this: that it was represented both in the application and in a nonmineral affidavit filed therewith and in the testimony given on the hearing that the applicant and witnesses had personally examined the land; that it was unfit for cultivation, but was valuable chiefly for its timber; that it was uninhabited and unoccupied, and that it contained no valuable deposits of gold, silver, cinnabar, copper, or coal, and that there were no mining or other improvements thereon; that these statements and representations were false, and known to the applicant and said Frick, when made, to be false, and were fraudulently made, solely for the purpose of deceiving the land officers of the United States and inducing the issuance of the patent; that it was the fact, and was known to both Robertson and Frick, that the land had always been more valuable for mineral than for timber, and that for a long time prior to and at the time of the entry of Robertson, and the issuance of the patent, and at the time of the purchase of the land from Robertson by Frick, there were located on the land gold quartz and placer mining claims, owned by one L. Parker of Grizzly Flat, the location of which appeared upon the records of the Recorder of El Dorado County, wherein the land was [19] situate, and that on a portion of said lands there were several thousand dollars worth of mining improvements owned by said Parker; that these facts were well-known to the applicant Robertson at the time he made his application and procured his patent,

and were fully known to the defendant Frick at the time he gave his testimony and when he made the purchase of the lands; it is alleged that after the transfer of the lands to Frick, Robertson died, and that Frick has since held the title to said lands and claims the same and the whole thereof, and that the said claim and the patent constitute a cloud on plaintiff's title.

The primary relief asked is that the patent be held void and set aside, and the land restored to the public domain, but coupled therewith is a general prayer that the complainant have such other or further relief as may accord with the principles of equity.

Frick alone answered (the fictitious defendants having been dropped out), denying the averments of fact counted upon as constituting fraud, and alleging that since prior to the commencement of the action he had ceased to have any interest in the land.

The record disclosed that Robertson's application was filed August 23, 1907; that his final proof was made October 28, 1907, and that on November 7, 1907, he made a conveyance of the land to Frick, the deed not being placed of record, however, until sometime after the patent issued, which was on April [20] 6, 1908. It was disclosed at the trial that sometime in 1911, the precise date of which does not appear, defendant Frick had deeded the land to the California Door Company, and that this conveyance was placed of record a short time prior to the filing of the bill herein, which was on October 27, 1911; that this fact came to the attention of the

Government's attorneys for the first time shortly before the trial, but investigation satisfying them that the Door Company was a *bona fide* purchaser for value, they refrained from making it a party, proceeding instead upon the theory that in the event fraud on the part of defendant Frick was shown, vitiating the title as to him, the Government would be entitled, under its prayer for general relief, to recover from him the value of the land, in lieu of a cancellation of the patent.

The case accordingly proceeded upon this theory, and the main questions presented for consideration are, (1) does the evidence sustain the charge of fraud as against the defendant Frick; and, if so, (2) is the Government entitled, in this form of action, to recover the value of the land in money damages as compensation for the fraud through which it has been deprived of its land?

The defendant contends that the only material consideration involved in the question of fraud is whether the land was shown to be more valuable as mineral land than for its timber; that if shown to be **[21]** chiefly valuable as timber land, which it is claimed the evidence establishes, then the other facts charged as elements of fraud become immaterial and the suit must fail. But I cannot accede to the correctness of this contention—either in the premise or the conclusion. In the first place, I am unable to concur in the view that the evidence shows with any certainty that the land is more valuable for its timber than for its mineral deposits; but if it were otherwise, there are further elements of fraud

charged which may no more be ignored than the alleged misrepresentations as to the character of the land. To be open to application and purchase by Robertson, it was quite as essential under the law that the land should be unoccupied and unclaimed and free from improvements by others, as that it should be of the character represented in the application; the statute requires these several facts to be stated and shown, and it does not undertake to make any distinction as to their materiality to constitute a valid application for purchase from the Government.

In this view, what are the facts as to the alleged fraud? As to the contents of Robertson's application and the nature of the testimony given by him and his witnesses before the Land Office, including the defendant Frick, there is no controversy. Their statements were to the effect that they were intimatly acquainted with the land applied for and every part of it, and had been over the property and [22] made a careful examination of it; that the land was not and would not be fit for cultivation; that it was steep, rugged, rocky, and of thin soil; that it was wholly unoccupied and unimproved; that there were no indications whatever of any salines, deposits of gold, silver, cinnabar, copper, or coal thereon, and that the land was chiefly valuable for its timber; and that no person had any claim, interest or right in said land or the timber thereon other than the applicant himself.

The evidence for plaintiff tended to show that the land in question is located in a highly mineralized

zone where much mining for the precious metals is carried on and has been for many years, and that the land in question has always been well known throughout the community as mineral land; that for several years prior to Robertson's application—some seven or eight—one Parker had both quartz and placer mining claims on a part of the land, which he had purchased from a predecessor and for which he had paid a consideration of some $1,200; his claims were of record in the Recorder's Office of the county wherein the land is located; he had a substantial dwelling on the land, where he lived with his family; that he prosecuted his mining operations on these claims, from which he had made a living for himself and family from the gold extracted therefrom; that there were at least two well-developed veins or ledges on the property; that his mining operations [23] included several hundred feet of trenches from ten to twenty feet deep and from twenty-five to one hundred feet or more wide; and that leading to his claims there was over a mile of ditches used to convey water to them; that these operations and his occupation as a miner were well-known, and that they had continued down to a period coincident with, if not later than, the filing of Robertson's application; that while Parker, at about that time, was absent by reason of sickness, his son was in possession for him; and that they were negotiating for the sale of their rights in the property, which they held at a value of $10,000.

In this connection, Mrs. Parker testified that she handled the gold that was taken out and that on one

occasion in but two days washing they took out over $340.00; that she thought this was after the earthquake or about that time; that they always made a good living from their mining.

The evidence further tended to show that the occupation of the land by Parker and his mining operations were well known to defendant Frick. One Mauk testified that he and Frick were partners in the mining business during at least a part of this period; that they discussed the amount paid by Parker for his mine or claims on the land in question; and that he and Frick rented a monitor to Parker for use in working the mine, Frick being present when the [24] monitor was loaded to be carried to the mine. Mauk further testified that he had been in the mining business about nine years, and that this vicinity was distinctly a mineral country, and that he had operated three or four mines within it, adjacent to this property, and found it profitable.

Mr. Kingsbury, the mineral expert for the Government, who made a careful examination of the land on October 3d and 4th, 1910, testified that there was evidenec of a good deal of work done upon the land; that cabins had been built, excavations one hundred feet wide and two hundred and fifty feet long, long, a couple of shafts dug, and trenches and ditches; that he made an examination of the ground as to its mineral qualities and found a number of "colors" of gold, and was of opinion from his explorations that there were sufficient indications for anyone to make a mine pay. This was the substance

of the evidence in behalf of the Government.

As opposed to this, the evidence on behalf of the defendant was chiefly of a negative character. It was to the effect that the witnesses had examined the land or were more or less familiar with it; that they did not discover any improvements thereon of any present value; that while there were evidences that mining had at some previous period been prosecuted to some extent on one part of the land, there was no work [25] of value or any indications of present occupation, and that they thought the place abandoned. Some of them testified that they saw no cabin or dwelling or evidence of habitation; one or two stated that they saw a cabin but did not investigate as to its being inhabited, as they thought it deserted.

As to the character and nature of the land, the witness Remick testified that he cruised the timber for the defendant and found there were about five million feet; he testified at first that he did not know as to its value, but later, on being recalled, stated his judgment that the timber was worth $10.00 an acre. His evidence as to the mineral character or value of the land was so entirely of a hearsay character that the Court was required to strike it out. The defendant Frick, testifying in his own behalf, stated that he knew positively the land was not mineral land; that he was thoroughly familiar with mining and mining property and had been over this land a number of times—had, in fact, surveyed it; that there were no paying mines in the country; that he considered the land worth about $5.00 an acre as timber land; that

rights further, must resort to an action at law for deceit, wherein defendant will be entitled to a trial of the issues by a jury. Under ordinary circumstances, [28] this would be true, but I do not regard the rule as obtaining in an instance of the present character. The case falls, I think, within the well-recognized exception that where the facts are such as primarily to give equity jurisdiction of the controversy, and that jurisdiction has obtained, if an act of the party charged has made the application of the specific remedy sought impossible or impracticable, the Court will retain jurisdiction to award money damages or give such other relief as may be just in the premises.

Such a case was Cooper vs. United States, 220 Fed. 867 (decided by the Circuit Court of Appeals of this Circuit), which, in the circumstances, is not to be readily distinguished from the present case. There the transfer of the land was made after suit brought but before service, and the bill was amended to bring in the grantee as a party. It appearing at the trial, however, that the latter was a bona fide purchaser for value, and the fraud being established, the lower court awarded a decree against the party charged for the value of the land in damages; and the appellate court held that this relief, being within the issues, was properly awarded under the general prayer.

Another similar case is that of Johnson vs. Carter, (Iowa), 120 N. W. 322, where the Court, in response to a similar objection, say:

"It would be a strange perversion of the spirit which pervades all rules of equity if, when a party, who had been defrauded [29] of his title to land, brings the person who defrauded him into a court of equity upon a demand for rescission of the conveyance, he can divest the court of jurisdiction by showing that he has conveyed the land to an innocent purchaser, and thus compel the injured party to resort to another forum for the recovery of damages."

So, in United States vs. Debell, et al., 227 Fed. 760, 764, it is said:

"While it is true that a complainant may not, in a suit in equity, join a cause of action in equity and a cause of action at law, and that where his cause of action in equity fails on the proof he cannot recover damages or moneys that he might have recovered at law, it is also true that where the proof sustains the cause of action in equity, but the defendant has by his course of conduct rendered the appropriate relief first sought ineffective, the chancellor may require him to make compensation for his prevention of that relief. Where the primary relief sought is the restoration of property and the defendant has placed it beyond his and the court's reach, the court may require him to pay the value of the property, or the proceeds he received from it, because the right to this relief inheres in and grows out of the equitable cause of action which the plaintiff has established. . . . . If therefore, the proof established the plaintiff's

cause of action in equity against the defendant for the restoration of the land, he cannot escape accounting for the proceeds he obtained for the property, or the value thereof, on the ground that he placed the land itself beyond the reach of the court."

Moreover, in this instance there would be little justice in requiring the plaintiff to bring an action at law. The defendant was made aware early in the trial of the theory upon which the Government was proceeding as to the relief sought, and made no motion to dismiss or any suggestion as to a desire for a jury trial, but proceeded without objection to a submission [30] of his evidence. Under the circumstances, I think his present contention comes too late.

Within these principles, I think the Government entitled to recover, under its prayer for general relief, the value of the land of which it has been deprived through defendant's fraud.

The only question remaining is as to the measure of the damages to be awarded in relief. The defendant contends that this may not exceed the price at which the land was sold by the Government—$2.50 per acre—and in that regard relies upon the provisions of the Act of March 2, 1896 (29 Stat. at L. 42, 43), entitled: "An Act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes"; but an examination of the provisions of that act will disclose that it has no application to a case of this character, but deals solely with the rights of bona fide purchasers in instances where the patent

has issued erroneously. It does not affect cases proceeding like the present, on the theory of fraud in the procurement of the patent. In cases of the latter character, the principle has always been enforced that one guilty of fraud upon the Government is not to be permitted to benefit by his misdoing; that having deprived the Government of property to which it is entitled, the latter may justly claim the return of the entire value of that of which it has been deprived. That was, as will be seen, the measure of damages sustained by the Circuit Court of Appeals in Cooper vs. United States, *supra,* and is **[31]** implicitly recognized as the proper measure in the other cases cited.

Under this rule, it appearing that the defendant has sold the land in question, which he acquired in wrong of the Government's rights, for the price of $32.50 per acre, I am of opinion that that figure should be the measure of the Government's recovery. Let a decree be entered accordingly.

[Endorsed]: Filed July 30, 1917. Walter B. Maling, Clerk. **[32]**

In the United States District Court for the Northern District of California, Second Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. P. FRICK et al.,

Defendants.

Statement of Evidence to be Included in the Record on Appeal.

Be it remembered that on the 9th day of May, 1916, the same being one of the juridical days of the regular May, A. D. 1916 term of the District Court of the United States, in and for the Northern District of California, Second Division, sitting at San Francisco, California, the above-entitled case came on for final hearing before the Honorable William C. Van Fleet, Judge of said Court, the plaintiff appearing by Ed. Jared, Esq., its attorney, and the defendant W. P. Frick appearing by Jordan & Brann, his attorneys, and thereupon the following proceedings were had, to wit:

And thereupon, the plaintiff, to maintain the issues herein on its behalf, offered and gave in evidence as follows, that is to say:

The plaintiff introduced in evidence the proof which was taken before the Sacramento Land Office on the issuance of the final receipt to the entryman, Bolling C. Robertson, and also his application to purchase the land herein involved, which was in the words and figures following:

(Here insert.) [33]

Testimony of J. W. Kingsbury, for Plaintiff.

J. W. KINGSBURY, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

I am mineral inspector for the United States General Land Office. My profession is mining engineer and geologist. I have been with the United States

(Testimony of J. W. Kingsbury.)
General Land Office since May, 1909. I received a bachelor's degree pertaining to mining engineering in 1903, at the University of Utah. In 1907 I received a master's degree from the Columbia University, where I took courses in geology, mining and metallurgy, specializing in geology. During the summers of 1901 and 1902, I worked in the mines at Park City. From 1904 to 1905 I worked in mines in Utah, in Gold Mountain and Bingham. After leaving Columbia I worked in Nevada, in Mexico and in Utah. I made an examination of the property described here, Lots 3, 4 and 5 and the southeast quarter of the northwest quarter of section 6, in township 8, Range 14, E. M. D. M., containing 199 acres on October 3 and 4, 1910. I found that there were outcrops of diorite and porphyry, that there had been considerable work there; there were two shafts, from 10 to 12 feet deep, in diorite, showing some quartz veins. There was also considerable placer work done. All of this work was on Lot 4, except the placer work, which started in on the south end of Lot 5 and ran north on to Lot 4. On Lot 4 there was quite an excavation. As I remember it, it was something like 250 feet long and 100 feet wide. It was placer work, where they had washed out the gravel. It was where they were working to get the gold, where mining work had been done. I remember two shafts. They were from 10 to 12 feet deep, in diorite, showing small quartz veins.

Q. Were there any cabins on the place?

A. Yes, there was one cabin. The cabin was in

(Testimony of J. W. Kingsbury.)

good condition, although it must have been several years old. The mining work had been done there [34] three or four years.

Q. Would you say that it was before or after the 28th of October, 1907?

A. I would be of the opinion that at least some of the work was before that, and that the cabin was built before that.

Q. Just state to the Court what mineral properties you found, and what value you considered it.

A. I was with a Mr. Murray at that time, and we did some panning in the trench on the southeast corner of lot 4, where we found a number of colors of gold in the pan. While we were not on bed rock, it was my opinion from finding that gold there that there was sufficient indication for a man to go ahead and develop the land with expectation of making it pay.

Q. You say, then, from just panning, you came to the conclusion that it would be worth working, that it was valuable mineral land? A. Yes, sir.

Q. Did you make any other examinations in the vicinity of this property?

A. I went over the property, but I did not make any examination of other property in the vicinity.

Q. Did you make any other test on this land besides that you have just spoken of?

A. No, I don't believe I did.

Q. Did you examine any quartz rocks?

A. I don't recollect whether I examined the quartz or not.

(Testimony of J. W. Kingsbury.)

Q. Did you see, in the vicinity, any other indications of mining?

A. Below the land, that is, half a mile to the south there had been considerable placer work done.

Q. You did not make any examination of the gravel? A. No, sir.

Cross-examination. **[35]**

Q. (Mr. BRANN.) Have you ever done any mining in California at all?

A. I never have worked in any placer or other mines in California; I have in Nevada and Utah. I have never done any placer mining, except examination of placer mines in California.

Q. Would you be willing, with these colors you say you got with Mr. Murray, to spend your own money in the development of this property?

A. Well, if I had the money to spend, I think I would.

Q. You think you would? A. Yes, sir.

Q. You base that on the fact that you have not had any experience in placer mining, but simply from your general mining knowledge?

A. From my general mining knowledge, and from the examination of other places.

Q. Have you ever studied the mining formation of this country, where this property is situated?

A. Yes, to some extent.

Q. Have you read the United States Geological Reports on it? A. Yes, some of them.

Q. Did you ever hear of the Plymouth Quadrangle? A. Yes.

(Testimony of J. W. Kingsbury.)

Q. Are you familiar with the report so that you could tell his Honor what the geological report is? First, I will ask you is this property in the Plymouth Peak quadrangle?

A. It is in the Pyramid Peak quadrangle.

Q. The Pyramid Peak quadrangle? A. Yes.

Q. Have you read the reports of the United States Geological Survey on this sufficient to tell his Honor whether this country up there is considered to be mineral bearing? A. I believe it is.

Q. I am not asking that you believe about it—
[36]

The COURT.—He is answering your question; you asked him if he read enough of the United States Geological Survey to be able to say, and he says he thinks it is.

Q. (Mr. BRANN.) Did you examine around about this land for any other mines, or mining, other than what you have testified to?

A. Just what I stated. I examined the Pyramid Peak quadrangle and the folio. As a matter of fact, I have it with me; I will show it to you if you wish me to.

Q. No, I don't care about it.

A. As I recollect it, there are a number of things shown in that Pyramid Peak right around there.

Q. Did you see some timber on this land?

A. Yes, there was some good timber on there—it was a timbered country.

Testimony of G. M. Mauk, for Plaintiff.

G. M. MAUK, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

I live in Eldorado County. I know about the property that was called the Parker mine out in that country. I think it is in section 6, 8 north, range 14 east. I think the last time I was on that place was in 1902; I am not sure whether it was 1902 or 1903, but I rather think it was 1902; that is my recollection. Mr. Parker and his wife were living there.

The last time I was there, when Mr. Parker was running this tunnel, he brought out a pan or two, and panned it out in my presence; there was some gold in the pan, but I cannot recollect, because I was not interested. I didn't pay particular attention, but enough to know that he had some gold in the pan. [37]

I know Mr. W. P. Frick. We were at that time in mining. Frick and I talked about Mr. Parker buying the mine of those parties, and the $1,000 price that we were informed that he paid for it.

Q. Do you know whether Mr. Frick was familiar with this property?

A. He was to some extent; he was with me there at one time after Parker bought the mine, and I think probably passed over the ground, but probably not right by the mine, two or three times. My recollection is there was a house on there when Mr. Parker first bought the mine, a small house, a cabin. There were ditches to the mine. I have followed mining as a business. The vicinity in which the

(Testimony of G. M. Mauk.)

Parker mine is located was known as a mineral region. The gravel in the Parker mine was very similar to that from where I was mining. I did mining a mile and a quarter from this property. The first mining I did was on what we call the Star gravel mine, in sections 27 and 28, township 9, range 14 east. I should judge it was about two miles from this property. We put in our plant 1,500 feet of pipe, and worked one month, and we cleaned up $1,800 with a small monitor. That was the first year's mining. Mr. Frick and I mined there the following year, in 1901.

Q. Have you examined any of the gravel around the Parker Mine? A. I never did myself.

Q. When was that mining done within half a mile of the Parker mine that you have spoken of?

A. Most of that was done before I commenced mining in that locality.

Q. You say that you and Mr. Frick were partners at one time; now, during the time that you were partners, I want you to state if you and Mr. Frick at any time ever loaned Mr. Parker any tools, or anything to do any mining with.

A. We loaned or hired him our monitor and as much of our pipe as he wanted. Mr. Frick was present when we loaded it on a wagon and hauled it over there. It was going to Parker's mine. [38]

Cross-examination.

Q. You say you were down there in 1902 the last time; is that right?

A. I think that is right. Parker was then run-

(Testimony of G. M. Mauk.)

ning a tunnel in the hill.

Q. Do you know whether or not there was any ground-sluicing done on the property?

A. In the canyons below that, where it breaks off near where he started the tunnel, it was mined there before Mr. Parker got the property.

Q. It had been ground-sluiced out before that?

A. Down lower in the canyon.

Q. When were you through there the last time?

A. It was either in 1902 or 1903.

Q. And at that time there had been mining workings on it?

A. Yes, prior to that time; that ditch was built years before Mr. Parker purchased this mine—it was an old ditch, or a portion of it was—I have crossed over it many a time.

Testimony of Ellen C. Parker, for Plaintiff.

ELLEN C. PARKER, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

I have no permanent home; I live with my daughters. At one time I lived upon a mine that was called the Parker mine. That was my husband's; he had it and I was up there with him. That is all the home we had—I gave up everything and went up there with him on the mine, and he built the cabin himself in Eldorado County. I stayed there most of eight years and more.

Q. Do you recall the year you left there?

(Testimony of Ellen C. Parker.)

A. I don't remember what year I left. He was sick.

Q. Was it before or after the earthquake?

A. It was after the 1906 earthquake. We owned it at that time. We owned it all the time.

Q. Who did Mr. Parker buy it from?

A. I couldn't tell you; I think there was a man named Jones and young Mr. Meyer; he bought of them. I know he paid about $1,200, $1,200 or $1,300. [39] We made our living from the mine for the eight years that we lived there. We had a good many hired men, because the ditch that he first dug broke before they got much out of it. A nephew of his came there and his own two boys, and they dug another ditch that went around another hill; it did not bring them out as much as when they washed into the first canyon where they got the gold. When we came back to that old place, in one or two days' washing they took out over $340. He built the cabin for me to come up to. It was a nice good cabin, and with a cellar to put our provisions in. He dug a well and we had a garden. He bought a pump. There was no timber claim put on the ranch at all. My husband died three years ago last January. He was the miner; he had too much ambition.

Cross-examination.

We first went on this property about two or three years before the San Francisco fire; he went there in 1902.

Q. When did he take the gold out of there, before

the San Francisco fire or afterwards?

A. Before, the most of it. The first *first* he dug worked, it paid well. That ditch broke. Then when they went hydraulicking from the other ditch they put in around the other hill it did not pay them well. He dug tunnels, but he didn't get any pay out of the tunnels. It was out of the same ravine that this big lot of money was taken out at the foot of our canyon. He was hydraulicking in the bank of the creek.

Q. It was the hydraulicking that he got his money out of? A. Yes, sir.

Q. And that hydraulicking, most of it, was done before the fire? A. Yes, sir. [40]

Q. The $300 you have told us about, that was gotten out before the fire?

A. That was after the fire. There was a good deal of timber on this property, not as much on the place where we got the gold.

Q. Was it good timber land?

A. Yes, good timber land, near our cabin were 7 or 8 big yellow pine trees. The water that came in the ditches Mr. Parker dug came from Mrs. Parson's ditch. Mrs. Parson's ditch was there when I went there. My husband made a ditch from Mrs. Parson's ditch and let the water come down so he could ground-sluice. The water that he had done his hydraulicking with came from Mrs. Parson's ditch. There was a Government surveyor there. The first two or three years we went up there we stayed there; but after that I only stayed

(Testimony of Ellen C. Parker.)
while we could hydraulic. Mr. Parker stayed all the time; he prospected.

Redirect Examination.

My husband left up there after the fire; he was sick.

Testimony of Antone Meyer, for Plaintiff.

Mr. ANTONE MEYER, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

In 1889 I located up in the mountains and then I sold my timber and since then I am in the hotel business. I know about the Parker mine; Mr. Parker was living there, and made his living from his mine while he was there; there were two little cabins on the ground. I could not tell in what year it was. When I was down the last time, Mr. Lee Parker came in with some rock while I was there. I looked at the rock; we went down to the ground and we looked at it. He made his living while he was there. I could not tell exactly how long he was there. I did mining adjoining the Parker claim, and the vicinity in which the Parker claim is located is known as mineral lands. **[41]** I knew W. P. Frick and part of his business at this time was buying and selling to the California Door Co. timber lands.

Cross-examination.

On this land there was some yellow pine. I went over there to see Parker; he was prospecting.

Q. Do you remember whether any of the land had been ground-sluiced out at that time?

(Testimony of Antone Meyer.)

A. There was a big cut below and they had pipe laying there. It is a good many years since I was over there, but I could not tell how many years it was.

Testimony of F. A. Mergurre, for Plaintiff.

F. A. MERGURRE, a witness called on behalf of the plaintiff, after being duly sworn, testified as follows:

I am the secretary of the California Door Company. The company purchased the land in suit from W. P. Frick. The check was given on May 25, 1911, at $32.50 per acre.

Plaintiff rests.

Testimony of J. E. Remick, for Defendant.

Mr. J. E. REMICK, a witness called on behalf of the defendant, after being duly sworn, testified as follows:

I have been a timber cruiser since 1902 and before that I worked in mines of all kinds, and am as generally familiar as the average layman is with mining matters. I know the 200 acres of lands that is involved in this suit. I was on that land May 5 and 6, 1916—I cruised the timber on it. There was about 5,000,000 feet of timber on the 200 acres. It is good timber [42] land for that neighborhood—it runs about 25,000 feet to the acre. The timber on the land is the ordinary species of that locality—California white fir, some sugar pine, the red firs, or as they locally term it spruce—white fir and some cedar.

(Testimony of J. E. Remick.)

Q. When you were up there did you look at the mining work that had been done on the land?

A. I saw some evidence of it.

Q. Tell his Honor in a general way what you saw and what this work was.

The COURT.—When was it?

Mr. BRANN.—The 5th or 6th of this month (May, 1916), your Honor.

The COURT.—It would not have any effect on my mind at all, what he saw at that time. I am not going to determine its mineral development or its value as a mine by what the witness may have seen there in May or April of this year.

Mr. BRANN.—May I ask him if there were prospect holes there?

The COURT.—You can ask him anything you please, and if there is an objection I will rule on it.

Q. (Mr. BRANN.) Will you state whether or not you saw prospect holes on this land at that time?

A. I did.

Q. What was their condition?

A. The prospect holes were kind of caved in, they were not in good condition.

Q. Was there any evidence of ground-sluicing having been done on the property?

A. There was evidence of some form of washing—either ground-sluicing or piping.

Q. Where was this ground-sluicing shown?

A. In lot 5.

Q. Was there a ravine there?

A. It had been a ravine, or a swale.

(Testimony of J. E. Remick.)

Q. State how much of the area of the land was taken up by this?

A. About an acre and a half. [43]

Q. From your knowledge of mining and minerals, would you consider this to be mineral land?

A. I would not take it up as mineral land.

Q. Just tell the court why?

A. We did some panning with no results, no prospects, no gold.

Q. (Mr. JARED.) How is that?

A. We panned some of the surface dirt along this excavation where they piped it, and we did not get a color.

Q. (The COURT.) Well, what were you doing there panning at that time?

A. I was panning.

Q. Were you preparing yourself as a witness?

A. I was.

Q. You went there to cruise the land as to its timber value, did you not? A. Yes, sir.

Q. Did they ask you to pan the gravel on the surface to find out whether there was any prospect there? A. Did who ask me?

Q. Whoever sent you there?

A. No, they did not.

Q. How did you come to do it?

A. I was in company with a mining engineer; I ran out the lines and located this work, and I was with this mining engineer who was doing the panning.

Q. How did you come to do any panning? You

(Testimony of J. E. Remick.)

went there to cruise the land.

A. I was just explaining to you that I was in company with Mr. English and he suggested that it would be better to pan some of the dirt; he was sent there as a mining engineer and inasmuch as I was with him I naturally assisted him in panning it.

Q. (Mr. BRANN.) Did you notice whether in these placer excavations there was any growth of timber?

A. There was some small second growth timber, some alders and willows.

Q. About how old would you say they were? [44]

A. I think in Lot 5 there would be timber perhaps 20 or 25 years old; in Lot 4 the timber was of a more recent growth.

Q. 10 or 12 years old maybe?

A. I would think there was some twelve; maybe some of it would look to be 6 or 7.

Q. What do you base your opinion as to that—how do you arrive at that?

A. By the size, the height, the diameter.

Q. Did you look to see if there was any quartz outcropping on this land?

A. I made no particular examination to see. I saw some quartz outcroppings.

Q. Can you tell from your own information about quartz as to whether it is mineral bearing, or not?

A. That is hard to say you know without an assay, but the quartz looked of very poor character.

The COURT.—Such evidence as this is absolutely valueless to my mind. He made no prospect in that

(Testimony of J. E. Remick.)

direction. I would not pay the slightest attention to it, Mr. Brann, and therefore it is idle to introduce the testimony. If this witness had gone there for the purpose of making prospects and examining ore-bearing rock that would be a different thing, but he just passed along and casually noticed some outcroppings.

Q. (Mr. BRANN.) Did you notice whether or not there was a ditch around this property anywhere?

A. There was a ditch north of the property and across the corner of lot 4.

Q. (The COURT.) Lot 4 is part of this tract?

A. Yes, Lot 4 is where most of this work was located.

Q. (Mr. BRANN.) Did you observe any cabin upon this land?

A. There was two cabins.

Q. What was their conditions?

A. Both in disuse and delapidated condition.

Cross-examination.

In 1907 the timber would have cruised practically the same. [45] There is naturally some growth. Any live tree will put on some growth, in diameter and growth. I have cruised timber since 1902 for The California Door Company, the Curtis-Holbrook Company, T. B. Walker and the Mendocino Lumber Company.

Q. Do you know what timber was worth back in 1907? A. I do not.

Q. You don't know anything about its value?

A. I don't know what it is worth there.

Testimony of W. P. Frick, in His Own Behalf.

W. P. FRICK, a witness called on behalf of the defendant, after being duly sworn, testified as follows:

I am the defendant in this action. I was one of the proof witnesses on the application of Mr. Bolling C. Robertson, to purchase this property from the Government in October, 1907. I had been over the property a year or two before I was a witness. The last time I had been over it was just prior to Mr. Robertson's final proof. I found the section corner between townships 8 and 9—12—and 8 and 9—13, which corner is the northwest corner of this particular land. I followed that section line and ran south on it and got down to the section next, the southwest corner of section 6; I came over the quarter stake on the south line of this section and ran north then to the quarter stake, taking in both sides of this property, the east and west sides. That was just a short time before Mr. Robertson had made his final proof, I ran through there for the purpose of ascertaining whether it was timber land.

Q. Have you had any experience in the matter of mining?

A. Yes, I had some experience in that locality and elsewhere. I am familiar with timber lands.

Q. From your examination of this land as you made it at that time, what is your opinion as to whether it is mining land or timber land?

A. I know positively that it is not mining land. I know that in that section of the country there are

(Testimony of W. P. Frick.)

no paying mines in there. Mr. Muck and myself tested that out in the immediate vicinity, in the same class of territory; I proved conclusively that there could be developed no mines. **[46]**

The land is timber land. It is covered with a good growth of timber, a very good average for that district, running in the neighborhood of 25,000 feet to the acre.

There were no mines in that vicinity that would pay. The gulches had been mined out in the early days by the old miners all through there by placer methods and ground sluicing and so on.

At the time I went over and examined this land I made an estimate of its timber sufficient to satisfy myself. I judged it to carry about 25,000 feet to the acre. It consisted of pine and white and red fir and cedar and a little sugar pine.

I did not get Robertson to locate the land. Mr. Robertson knowing my familiarity with the country and knowing that I had known the land in that district asked that I be a witness for him. He was a very fine old gentleman who dealt in lands and real estate; he lived in Oakland at the time that I first met him. I think I paid Mr. Robertson about $5.00 an acre for the land a short time after he got title to it.

In 1902 Mr. Muck and myself mined in that vicinity. It proved a failure. We did not make any money out of it. I satisfied myself at that time that there was no mineral in that district in paying quantity.

(Testimony of W. P. Frick.)

Cross-examination.

I testified at the time that I was a proof witness, that there were no improvements on the property. I did not know at that time that there was a house upon the property—I didn't know there had been any shaft sunk on the property and I didn't know that Mr. Parker was living there. So far as I know it was unoccupied. There may have been a cabin in a gulch there and you would not see it. I didn't know that there was a cabin there. [47] There were no indications of deposits there, no indications of value that I saw.

Q. Is it a fact that you and Mr. Muck lent Mr. Parker a pipe and a monitor to work the mine?

A. We evidently did. It has passed out of my memory. If we did I did not know they went on this property. I was not familiar with it at the time; it was quite a distance.

Q. Didn't you and Mr. Muck discuss the price that Mr. Parker paid for this mine?

A. We probably did. That has passed out of my recollection; I did not know that it was on this property.

Q. It was out of your recollection in 1907 when you were a proof witness to, was it?

A. Oh, yes, I didn't know it was on this property.

Q. You deeded this property, I believe, to the California Door Company? A. I did.

Mr. Robertson did not live up in this country. He went up there fishing and went around. He knew the lands generally. He went up there quite a bit

(Testimony of W. P. Frick.)

so I was told. I did not suggest to him that there was a nice timber tract up there that he could make application for and make an entry. I did not talk to him about it before he made the entry. He knew that I was in the timber business. He was a man who was familiar with lands generally. Robertson made his final proof I think October 28, 1907 and I bought the property about 9 or 10 days afterwards. The deed was recorded September 29, 1909, nearly two years later.

In buying lands in any district it is always our practice not to give notice to the public that we were buying lands because if they knew we were buying lands they would raise the price on us. It is our practice to purchase timber lands without letting the public know it. You can make your tranactions better. The deed was introduced in evidence, marked Plaintiff's Exhibit 2. [48]

I met Mr. Robertson in Oakland the first time in the summer of 1906; he was then a real estate dealer. He had presented some timber land to me, he was buying timber at that time. He was an agent for Mr. Jacobi at that time. He had an office in the same building I was in. I happened to become a witness for Mr. Robertson as follows: As I remember the transaction now Mr. Robertson asked me if I would not be a witness, that he had found some land that was vacant in Eldorado County when he was up there fishing. He said he had one witness living in that country. He asked me if I could not act as a witness for him and I said certainly I would. I

(Testimony of W. P. Frick.)
knew the land when he described it to me at that time because I was familiar in that district, I was very happy to act as a witness for him.

Q. And when did you first speak to him about purchasing this property?

A. He came to me shortly afterwards. Mr. Robertson was then failing.

It wasn't understood between us that I was going to buy this entry after he had gotten the title to it.

The country is brushy and you cannot see a small cabin. We cruise timber in a general way; I cruise timber running down these side lines.

I knew there had been prospecting done in that district, in that altitude all through the Sierra Nevada Mountains there has been more or less prospecting done but nothing valuable found. It is in very rare cases that any mineral has been found in paying quantities such as is known by all reputable mining men.

This suit was commenced October 27, 1911—the suit was commenced after the transfer to the California Door Company.

I had surveyed this property in about 1904. **[49]**

Q. And you did not see at that time any indication of mining there, I believe you have stated?

A. Yes, evidently there was some abandoned cuts that we would run into occasionally which you find all through that timbered country, early day prospecting. In running this line south, as I remember I ran it, I could see no improvements there.

We did not consider old abandoned mining cuts as

(Testimony of W. P. Frick.)

evidence of any improvements. I was cruising the timber and I was looking at the timber going through there at that time.

If I had seen the cabin it is a good many years ago, I don't know whether I would pay any attention to it as there were little old shacks through that country, used by old miners who had prospected through that country. Mr. Robertson was familiar with different parts of this country as he had informed me that he had gone up there fishing and hunting. I think he told me he used to go over to Amador County and go down there.

Redirect Examination.

Q. Mr. Frick, did you ever do any mining on this property? A. No.

In cruising timber it always has been my method of staying close to the lines, the township and section lines, and making the cruise from there. We go over the section lines and if we happen to be at a place we cannot see so well we walk out and make a general estimation. At that time we did not make such close cruises, and I did not make such a close cruise because I was not interested in the country at that time; we had made a general run through there to look it over.

Mr. Robertson came to me shortly after he made his proofs. He was sick; his physician had stated that he had Bright's [50] disease and he could not live very long. I remember at the time he made his proof there at Sacramento he was failing very rapidly. A short time after that he came to me and

(Testimony of W. P. Frick.)
said, "Mr. Frick, I would like to have you buy that land." I said, "Mr. Robertson, it will depend a great deal on what you will sell it for, because it is rather isolated at the present time for timber land and I would probably have to hold it sometime before I could sell it,"—"Well," he says, "I don't know who I could sell it to unless you would buy it." He finally made a price that was a sufficient inducement for me to risk purchasing it at that time, and I purchased it.

Testimony of Dr. J. C. Anthony, for Defendant.

Dr. J. C. ANTHONY, a witness called on behalf of the defendant, after being duly sworn, testified as follows:

I knew Mr. Lee Parker, Sr. I met him first in San Francisco, sometime before the 1906 fire. I visited the land that he had in Eldorado County where he claimed he had a mining claim with a Mr. Holbrook and a Mr. Chappell. We found some prospect holes. The property had been represented to us as being mining property and we agreed to purchase it if it was as reported.

We found absolutely nothing there to warrant the purchase of the property. His son was there on the property and had a Little Giant at work there and was barely making a living. The samples and things that came through Mr. Chappell who remained on the property did not show any values at all. There were absolutely no earmarks of a mine anywhere. The only thing was the little sluicing he was doing

(Testimony of Dr. J. C. Anthony.)
down in a gulch. It was in 1907, I think in February.

Cross-examination.

I have paid about $100,000 for my information in mining. [51] I was born and raised in mines; my father was the original discoverer of copper on Lake Superior.

The boy was barely making a living there—that is what he said—I did not see his clean up. The father represented he had 220 acres of land running through from the middle fork of the Consumnes over into a creek; when we asked to be shown this land the son absolutely refused to go beyond 80 acres; he said his father did not own anything beyond 80 acres. When we came back to Sacramento we stopped at the Land Office and found that that was true. It was a mining claim in his name—that was in 1907.

There was one cabin with three rooms, and a big fireplace. There was another cabin he said he had built for another property but not on his land—it was in a little depression there. The cabin was not more than 200 or 300 yards from the mining.

Mr. Parker asked for this claim $10,000—it was not worth the trip that we paid going up there. The only thing that was of any value that we could see was what timber there was on it. There was some very good timber on it. I would not call it an extra good purchase for timber, but there was some good timber on it.

Q. This hydraulicking, was there a good deal of it done there at that time?

(Testimony of Dr. J. C. Anthony.)

A. No, that was the only thing that was working.

Q. Did you see any values there that attracted you at all, placer or otherwise?

A. None whatever. We turned the property down flat. The land was not such as would warrant us in spending any money as miners in developing it. We went over all the property where he told us that there was any mining developments and did panning—there was no indication there, there was no [52] lead, there was nothing there that any mining man would want. We brought samples back. I think we only panned in three places—all the places he showed us and that he claimed to be mining property. Those samples didn't show anything—a few cents—none of them went 50 cents a ton.

It was the quartz, it was the quartz that Parker laid so much stress upon. He said he had property there that contained platinum. We brought some of the samples down that he said there was platinum in, but we proved there was nothing in it--this was in 1907 I think in February. The son was working there—he said he had not been there a great while at the time.

Testimony of Ezra Taylor, for Defendant.

EZRA TAYLOR, a witness called on behalf of the defense, after being duly sworn, testified as follows:

I am one of the gentlemen who was a proof witness for Mr. Robertson on the land involved in controversy here. Have lived at Plymouth, Amador County, about 25 years. I first met Mr. Robertson fishing on the river up there, in this neighborhood,

(Testimony of Ezra Taylor.)

about six months before I went down to Sacramento as a witness.

I know the property in controversy here. I have known it off and on for twenty-five years. I have passed over it and I have mined around in this vicinity. I was last on the property in the year 1907, about a week before Mr. Robertson proved up, with Mr. Robertson.

Q. Did you see any mining improvements on it when you went over there?

A. There had been some mining done there, yes.

Q. Was anybody mining on it when you went over it? A. No, sir, I did not see anybody.

Q. Do you know whether there was anybody mining there? A. There was nobody mining there. [53]

Q. What was the nature of the work that had been done on this property, as near as you can tell us at this time?

A. It looked like it had been ground-sluiced, a good deal of it. There was one place there where they had worked a cut up there, and it had caused a landslide, which slid a lot of ground out, and I think, from the looks of it, the high water had washed it more and caused it to look like quite a bit of mining had been done there, but I think it was mostly from the slide. There was an old unoccupied mining cabin there. I did not go in the cabin. It did not look as if there was anybody in there. It was a small house. I just supposed it was an abandoned cabin.

Q. You heard the testimony in regard to this cut

(Testimony of Ezra Taylor.)

that they tell about. Is it on this land?

A. There is a cut on the land.

Q. The tunnel and cut that the witnesses spoke about this morning, do you know whether it is on that land or not? A. I don't think it is.

Prior to 1907 I had been over this land—I was on it every year off and on at different times.

There had been some mining in that gulch at different times. I think they usually mined there in the spring of the year on account of the water, because the water usually gives out about the first of June. Of course, it depends on the condition of the season, how much snow there is, and so on, as to how long the water holds out, but I think the most of the mining down in there was done in the spring. I think a man named Keyes mined in there at one time. I think he got killed in that gulch, or right close there.

I mined some there in the mouth of that gulch, one winter four of use worked there; we shoveled it into sluice-boxes; four of us worked there a month and made $40. I never heard of any profitable mining being done around in this neighborhood, not of late years—I suppose there had been in early days. [54] This ground-sluicing I tell about had been done prior to 1907. I don't think there was any land left there that could be ground-sluiced when I went on there in 1907. There are no known mines in the vicinity of this property at all that I know of. The nearest paying mine from there is about 40 miles; that is the Plymouth Consolidated Mine. I never saw any leads

(Testimony of Ezra Taylor.)

on this property. I saw some white crystalized quartz, but I don't think it contained any mineral.

Q. What is the land in regard to timber?

A. It is very good timber land. There is some sugar pine, some fir, some cedar and yellow pine. I should judge it would go about 15 trees to the acre; 15 trees to the acre is not slim for sawmill timber.

Q. For how long a period prior to 1907 had this been ground-sluiced out there, if you know?

A. I could not say exactly how long. I think 1906 was the last time they worked in there, but I am not positive about that. I don't think there has been any mining done there since 1907.

Q. From your knowledge of sluicing, when you went on that land in 1907, what would you say of it?

A. I would say it was more valuable for timber than it was for mining.

Q. Why would you say that?

A. Because I did not think there was any paying mines there. It was what I would consider a pretty fair piece of timber land.

Q. What were the general conditions there at that time in regard to gravel, in 1907?

A. I don't think there was any gravel there; I never noticed any or saw any. I never saw any gravel there.

Q. You said there was no gravel in this ravine; what was there that they mined there, or ground-sluiced for, that is what I want to get at?

A. Well, that is what I would like to know. This ditch they have spoken about was not on the land, I

(Testimony of Ezra Taylor.)

don't think. In going down on the west side you could not see those cabins there—you could not see them from the east side, either, there was too much timber—you have to get pretty close to them [55] to see them, because there is too much timber. The cabin is in a basin—around there is what we call buck brush, but not very much—the timber consists of cedar, spruce, fir. You can see the cabin perfectly plain when you get pretty close to it. I don't think you can see the cabins from where the mining work had been done.

Cross-examination.

Mr. Robertson asked me to act as a witness in the purchase of this piece of land that is in controversy. I saw him fishing up there, and asked him if he was up there fishing. I run cattle in that country, and I am very inquisitive if I see a stranger up there. I want to know what he is doing. I asked him if he was fishing, and he said he was up there fishing, and also looking for a good piece of timber land. I told him there was some in there. He came back afterwards and asked me if I would show him the corners. He knew where my cattle camp was—I stayed right up in the mountains at that time, looking after my cattle.

Q. Why is it you stated, when you came and gave your proof, that there was no improvement on the place?

A. Because I consider them abandoned improvements. You can go to almost any quarter section

(Testimony of Ezra Taylor.)

up there and you will find some cabin or house. I did not go in it.

Q. You didn't put yourself to the trouble of looking in the Parker house to see whether people were living there? A. No.

Q. Was there a road or pass leading to the house?

A. Yes, sir.

Q. Anyone passing over or through the Parker claim could see the road leading to the house, could they not? A. Yes.

Q. Why did you testify that it was unimproved property?

A. Because, just as I stated, I supposed it was abandoned property.

Q. If you had a monitor and plenty of water, do you think you could have done more successful mining than you did? A. No, sir, I don't.

Q. You would think $40 is all you could have gotten out of that? A. Yes, sir. [56]

Q. Don't you know, as a matter of fact, that Mr. Parker and his wife and son lived there in that cabin for several years?

A. They were there for a while. He was locating all the ground he could possibly get a notice on.

Q. Do you know whether or not he was working on this place? A. I never saw him working it.

Q. How many times were you on the place, then, before you testified as to its character?

A. Oh, I was on it two or three times, or four or five times a year for 25 years. I was riding after cattle. I spoke to Mr. Parker. During all the time

(Testimony of Ezra Taylor.)

I was on there I never saw him mining.

Q. Do you know where Mr. Parker's home was during all these times you are telling us about?

A. I supposed he lived down here somewhere, either in Oakland or San Francisco, or somewhere down here.

Q. What seasons of the year were you over this land?

A. I usually went up there about June and left there in November.

Q. And during that time from June to November, you never saw Mr. Parker working any of this land?

A. No, sir.

Testimony of Robert White, for Defendant.

ROBERT WHITE, a witness called on behalf of the defendant, after being duly sworn, testified as follows:

I was familiar with the land involved in this controversy around about the year 1907 and before that time. At that time my residence was in the same section. I was living in the southeast quarter, where I own a 40-acre lot. I have a homestead there, since 1904 or 1905. I knew of Mr. Parker being on this lot 4 of the land referred to in this suit about that time. I saw Mr. Parker on that land about 12 years ago, in 1906. I would be there crossing ground probably several times during the summer each year.

Q. Was there any mining being done there that you know of, in 1906?

A. I could not say that there was any being done

(Testimony of Robert White.)

in 1906; there might have been very little. [57] Mr. and Mrs. Parker—the old gentleman and the old lady, they were living there in 1906, during the summer time. I don't know that there was anyone in 1907.

Cross-examination.

There was a blind road that passed up the ridge above the house. You could not see the house from this road, but there was a trail from the road to the house.

Testimony of Seymour Hill, for Defendant.

SEYMOUR HILL, a witness called on behalf of the defendant, after being duly sworn, testified as follows:

My business is mining principally. I examined the property in controversy here May 7, 1916, with regard to seeing whether or not it is mining property. I saw a hole, I could not say how deep, but from the dump I suppose perhaps 4 feet deep, or something like that; and another one a little further up the hill, perhaps 7 or 8 feet. I looked for quartz. They were evidently sunk for quartz. There was a little quartz on the dump—well, you might say blisters of quartz. I took some of the best-looking rock I could see from each place and took them home and pounded them up to see, and I didn't get anything out of them at all. A little further over, between the cabins and those holes, there was evidence of some surface mining. I should think at the head of where it had been sluiced out it was 150 feet wide,

(Testimony of Seymour Hill.)

or perhaps a little longer. I went down into those cuts. I also followed them down the creek that goes south from the river until I was satisfied I was off of that ground. I did not see any quartz gravel, or, in fact, any kind of gravel at the upper end where they had been mining; it was just like a big wash-out that there will be in any of those granite mountains; they were soft. In fact, I did not see any evidence of anything that would make either a gravel or a quartz mine.

Q. In your opinion, is that land valuable for mining? A. No, sir. [58]

Q. Why not?

A. Well, in my experience in mining, it generally takes something to make gold—to use my own phrase, and we do not usually find gold in a mountain without there is gravel there for placer. There is no evidence of any ledge there. There are very little stratas of white, blister-looking quartz; they seem to be more of a gush than anything else; they don't seem to go any place. I did not see any evidence of a mine there.

Q. Did you see anything there that would warrant a man in expending any money in developing it?

A. No, nothing whatever.

Q. Tell us about this cut-out or wash-out; did that show any evidences of any gold there?

A. No, I saw nothing there at the head of it—the bigger part of it—I saw no evidence of what would cause any gold to be there.

As evidence of gold I would look for gravel in

(Testimony of Seymour Hill.)

placer. If there had been any gravel there, there evidently would be some of it along where they did work. You would see gravel boulders and rock. There would be some signs of it. I did not see a piece of gravel as big as my fist in the whole thing. Further down the ravine, there was little signs of a little gravel there. My impression would be, from what I had seen of it, that there had been a little ravine, perhaps 8 or 10 feet wide, that at some time or other had gold in it, but that had been washed out, and they followed it up into the mountain, where there was absolutely nothing. Those ravines occur in the country around about there. We have a very wide belt of it in Eldorado county. This is in the extreme east; in fact, it is beyond anything that ever amounted to very much.

The land showed no evidences of mining having been done on it recently. [59]

Cross-examination.

I am not a mineralogist. My experience is life-long mining. You could not get into the shaft, it was all caved in. It is a fact that you can find quartz lying around very valuable mines and you would not find any gold of any consequence in them at all. That is true of a larger ledge, where there is more quartz; there is so little quartz here that you could not make a mistake as to what came out of the hill.

I think it is in the south end of the shaft, there is one side of it, anyhow, that has just a little, small —I would not call it a ledge at all in a country where

(Testimony of Seymour Hill.)
there are ledges; it is a very small, little bit of quartz, it does not show on the other side. I took pieces from the largest quartz you could see that came out of that hill. Evidently, none were ever taken away. Those shafts were partly filled. There had been mining done there in the past.

Testimony of Norris English, for Defendant.

NORRIS ENGLISH, a witness called on behalf of the defendant, after being duly sworn testified as follows:

I am a mining engineer, residing in San Francisco. I graduated from the University of California 19 years ago, and have followed my vocation exclusively right along. When I first graduated, I acted as assistant to H. F. Harvey, mining engineer at Galt; a little bit later I was foreman of the Grant gold mine in Tuolumne county. Early in 1908 I was made assistant superintendent of the Lightener Mine, at Angels Camp. In 1909 I worked in a mill at Plymouth, a mill that was working the old waste dumps of the Plymouth Consolidated Mines.

I examined the property in question here on May 5th and 6th, 1916, with a view to testifying about it here.

There were two cabins on the ground—the cabins are in [60] bad repairs. They are somewhere from 10 to 20 years old, I should judge.

As to workings, in the northwest portion of Lot 4 I found a pit about 10 feet in diameter and 5 feet deep at the present time; it has been excavated; it

(Testimony of Norris English.)

was a solidified granite. It was partially filled up. I took a sample of the material that had been excavated from the shaft and brought it down here with me and had it assayed. About 150 feet from that shaft is another shaft. At the present time it is open to a depth of 12 feet. On one side of the shaft there is a stringer of quartz that I measured. The shaft is in a dangerous condition, and I did not go down into it. There was a cut alongside the shaft, and I came down into that and reached over and measured the quartz. It was 11 inches wide. That quartz continued on down as far as I could see in the shaft to where it was filled, but it did not show on the opposite side of the shaft. I took a sample from the quartz in place, from as low down as I could reach, and had it assayed, and it showed no values in gold or silver.

The first sample either assayed a trace in gold or silver, or one one-hundredth of an ounce, 20 cents per ton; it was negligible.

Further south from this second shaft, and down a ditch which runs in a northerly and southerly direction across lot 4, and I think in pacing the distance it was slightly over the southern boundary of Lot 4, there is a ground-sluice, where water has been turned out of the ditch and has sluiced out a cut that is about 15 feet wide and 15 feet deep, and 50 or 60 feet long. Further down the slope, the ditch runs on below that, about 2 by 3 feet in the section; in the bottom of the [61] ground-sluice is the remains of an old windlass that was sunk down

(Testimony of Norris English.)

on a slip in the granite.

This excavation does not show any gravel; it was merely an excavation in soil and decomposed bed-rock. The dump from the shaft that was sunk below the windlass consisted of decomposed granite sand.

About 150 feet east of the second shaft that I refer to, and about 500 feet from this ground-sluice, there was another ground-sluice in a small ditch taking water from the main ditch, and runs down hill in a small section, about 2 by 2 feet, for 100 feet, and then was enlarged until the section was probably 20 by 20 feet for a distance of 150 or 160 feet. This excavation shows no gravel, whatever, very little quartz, and is entirely in soil and decomposed bed-rock, consisting of granite and diorite. This cut continued on down and flows into the main cut where the principal mining was done on the property, but is smaller in section, about 5 by 5 feet. That is not quartz work at all, it is all placer work, except those first two shafts.

The principal work on the property has been done about 200 feet south of the most westerly cabin; it consists of a ground-sluice, or a sluice that has been carried up from the ravines, 1000 feet or more down below the cabin up to within 40 or 50 feet of the ditch. The upper part of the cut has been worked out by the use of a small giant, which took water out of the ditch, and which was connected by a string of eight-inch pipe, because there is some of that size pipe on the ground. This excavation in no place shows any gravel. I examined particularly the

(Testimony of Norris English.)

coarse rocks that had been piled out and thrown out of this trench, so as to give the water a chance to cut, and [62] found no washed gravel. The entire cut is in soil, and the soil is principally a decomposed lava, it makes a deep, red soil, and below that in decomposed granite.

That is all the workings I saw on the property. On Section 31, adjoining this property, and a quarter of a mile beyond the point where the ditch comes into this property, there has been a tunnel run and some quartz lying around the dumps.

The quartz only occurs in spots here and there. There is no distant ledge, and there is no continuous outcrop, and no indications that the ledge would become continuous in depth.

There was no gravel on the property. They were ground-sluicing the soil and decomposed bedrock.

Q. From what you saw, would there be anything there to warrant a man spending his time to develop the property?

A. There is absolutely no indication that would warrant a prudent man in making any expenditure there to develop a mining property.

Q. Could a man make anything from working this land in the way of profit in mining?

A. No.

I panned the sides of the principal cut in five different places, in order to find out if the decomposed bedrock and soil carried any values, and I did not get any colors in any one of the five pans. I think

(Testimony of Norris English.)

anything that may have been there in the early days has been exhausted.

Around this principal ground-sluice as to which I have testified, there are second growth pines that I suppose are anywhere from five to ten years old; they are an inch and an inch and a half in diameter. Further on down, in a place where the water from a spring runs, there are alders, above 4 inches in **[63]** diameter, that have grown there since mining stopped. I don't think any mining has been done there inside of 10 years, except a little prospecting around with a pan. I think the shafts were sunk with the idea that the quartz would become larger and richer with depth, but there are no indications of any values of quartz on the surface, or any size that would make a mine.

Cross-examination.

I think one man, or two men, could have done all the work there in five years.

Q. Now, you don't mean to say from your examination, that a man and his wife could not have lived from the proceeds of the mineral they got out of that ground, do you? A. Absolutely, yes.

I said I was there two days—I put in 12½ hours. And from my examination I could go back and read back for eight or ten years, and say that no mineral of any consequence had been brought out of that ground. It is not a fact that our best mineralogists and our best mining engineers are often deceived on these things, though they are at times.

Q. If you had surveyed that tract of land, and had

(Testimony of Norris English.)

cruised the timber, would you have noticed these excavations and all this work that you narrated?

A. If I had run the range line between townships 13 east and 14 east, I would not have seen this work.

Q. I am speaking of surveying the land.

The COURT.—Answer the question. He says if you surveyed the land and cruised the timber, would you have seen the evidence of this work and this excavation.

A. I don't think that is a proper question.

Q. Will you answer it? It is not for you to rule upon whether it is a proper question, or not. I have admitted it. Read the question, Mr. Reporter. [64]

(Question read by the reporter.)

A. May I ask you, Judge, whether you mean by surveying the land, the same kind of a survey the Government makes when it subdivides the land?

Q. Can you answer the question? If not, just say that you cannot. It is a perfectly proper question.

A. No.

Q. (Mr. JARED.) Was there any timber near the place? A. Near what place?

Q. Near the place you have spoken of, these shafts and the ditch and the houses.

A. Yes, there is timber everywhere.

Q. Then, if you had cruised that timber there, would you not have seen the cabins?

A. No.

Q. What would you have done to keep from seeing them?

(Testimony of Norris English.)

A. In cruising timber, it is only necessary to cruise a narrow strip.

The COURT.—Do you know anything about cruising timber?

A. Only from what I have been told.

Q. (Mr. JARED.) How far was the line from this cabin?

A. About 1,000 feet, that is, the range line.

Q. (The COURT.) Where would you have to go, according to your idea, Mr. English, to get a chance to see these buildings and this work that you have been so elaborately describing here?

A. You would have to go across the north end of the property.

Q. You would not have to go among the timber at all? There is no timber there, I suppose.

A. Yes, there is timber everywhere, Judge.

Q. Then why do you say if you had cruised the timber on that place you would not see these improvements you have been describing?

A. Because I would have taken the north and the south line. **[65]**

Q. I am not talking about what you would have done, at all, I am talking about what was done. You have not got any partisan feeling here, have you, as a witness?

A. No, only if I don't think you are asking fair questions I am partisan, yes.

Q. It is not for you to pass upon the questions. Counsel asks them, and if the other side objects the Court passes upon them, the witness does not.

(Testimony of Norris English.)

A. No, but I would like to have the question specify what it means.

Q. When you are in court you will have to answer the questions as they are put to you.

Q. (Mr. JARED.) Why, don't you understand what surveying a section or a quarter section is, and what cruising timber is?

A. Because I know nothing about cruising, except what I have been told.

Q. You know what surveying a quarter section is?

A. Yes, it is setting a certain number of corners; I know how it is done, because I have done it.

Q. Do you know how far the north line is from the cabin and from the excavations?

A. Yes, I know approximately; the north line is some 200 or 300 feet from the cabins.

Q. And then you would say that you could survey this property, and would not know that the cabin was located there?

A. I may not have run that part of the line at all, because the Government, in surveying on those sections, does not run all the lines.

Q. How do you know that the Government does not run those lines?

A. Because I have worked on the Government survey.

Q. What kind of lines do they run?

A. They run either a north and south line or an east and west line, whichever happens to be [66] most convenient to run out and set a corner.

Q. How far was the corner from the cabin?

(Testimony of J. E. Remick.)

A. The cabin was at least 1,000 feet from the corner.

Testimony of J. E. Remick, for Defendant (Recalled).

J. E. REMICK, recalled as a witness for the defendant, after being duly sworn, testified as follows:

In 1907, in October and November, I was familiar with the value of timber of this character. This timber was worth about $10 per acre.

Cross-examination.

Q. I believe you said it would cruise about 25,000 feet per acre, did you not? A. I did.

Land cruising 25,000 feet per acre was not worth over $10 in 1907—you must understand that land is worth just what you can get for it. [67]

Stipulation Re Statement of Evidence.

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties hereto that the foregoing statement of the evidence to be included in the record on appeal is full, true, complete and properly prepared, and that said appeal may be heard thereon, and that it shall become a part of the record of said cause for the purpose of an appeal herein.

ED. F. JARED,
Asst. U. S. Atty,
Attorney for Plaintiff.

JORDAN & BRANN,
Attorneys for Defendant W. P. Frick.

Dated: 30 July, 1918.

Approval of the Statement of the Evidence to be Included in the Record on Appeal.

The foregoing statement of the evidence to be included in the record on appeal being now presented and found to be true, complete and properly prepared:

I do hereby approve the same and direct that it be filed in the office of the Clerk of the United States District Court for the District of California, and that it shall become a part of the record for the purposes of an appeal herein.

Dated at San Francisco, California, the 30th day of July, 1918.

WM. C. VAN FLEET,

United States District Judge, Northern District of California, Second Division.

[Endorsed]: Filed Jul. 31, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [68]

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,388—IN EQUITY.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. P. FRICK, JOHN DOE, RICHARD ROE and ALBERT DOE,

Defendants.

Petition for Order Allowing Appeal.

To the Honorable Court, Above Entitled:

The above-named defendant, W. P. Frick, conceiving himself aggrieved by the decree filed and entered on the 7th day of August, 1917, in the above-entitled cause, does hereby appeal therefrom to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit for the reasons and upon the grounds specified in the assignment of errors, which is filed herewith, and prays that this appeal may be allowed, that a citation issue as provided by law, and that a transcript of the record, proceedings, exhibits and papers, upon which said decree was made and entered as aforesaid, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco.

And your petitioner further prays that an order be made fixing the amount of security which the defendant, Walter P. Frick, shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this court be suspended and stayed until the determination of said appeal by said United States Circuit Court of Appeals for the Ninth Circuit.

JORDAN & BRANN,
Attorneys for Defendant W. P. Frick.

[Endorsed]: Filed Nov. 14, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[69]**

In the United States Circuit Court of Appeals in the Ninth Circuit, in the Northern District of California.

W. P. FRICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Assignment of Errors.

W. P. Frick, one of the defendants in the cause in the court below, entitled: "United States of America, Plaintiff, vs. W. P. Frick, John Doe, Richard Roe and Albert Doe, Defendants." In Equity—No. 15,388 in the District Court of the United States for the Northern District of California, Second Division, and appellant herein, by Jordan & Brann, his solicitors and counsel, says, that in the record and proceedings in the said cause in the said court below there is manifest error, and he particularly specifies the following as the errors upon which he will rely and which he will urge upon his appeal in the above-entitled cause:

1. That the District Court of the United States for the Northern District of California erred in holding that the evidence in said action sustained the charge of fraud made in the bill against the defendant W. P. Frick.

2. That the District Court of the United States for the Northern District of California erred in holding that the evidence was sufficient to entitle the

plaintiff to recover from the defendant the amount of money he realized from the sale of the land after he had sought it from the patentee.

3. That the District Court of the United States for the Northern District of California erred in finding in favor of the plaintiff and against the defendant W. P. Frick on the ground that the evidence was insufficient to support the findings of the Court.

4. That the District Court of the United States for the Northern [70] District of California erred in sustaining the bill of complaint and entering the decree herein.

5. That the District Court of the United States for the Northern District of California erred in not dismissing the complaint as prayed for by the defendant.

In order that the foregoing assignments of errors may be and appear of record, the appellant presents the same to the Court, and prays that such disposition be made thereof as is in accordance with the law and the statutes of the United States in such cases made and provided, and that said decree be reversed and the bill of complaint herein dismissed.

All of which is respectfully submitted.

JORDAN & BRANN,
Attorneys for Defendant W. P. Frick.

[Endorsed]: Filed Nov. 14, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [71]

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,388—IN EQUITY.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. P. FRICK, JOHN DOE, RICHARD ROE, and ALBERT DOE,

Defendants.

Order Allowing Appeal.

The foregoing petition for appeal is hereby granted and the appeal is allowed and upon the petitioner filing a bond in the sum of seven thousand five hundred dollars with sufficient sureties, to be conditioned as required by law, shall operate to suspend and stay all further proceedings in this court until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Nov. 22, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [72]

In the District Court of the United States for the Northern District of California, Second Division.

IN EQUITY—No. 15,388.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. P. FRICK, JOHN DOE, RICHARD ROE, and ALBERT DOE,

Defendants.

Order Allowing Withdrawal of Original Exhibits.

On motion of Messrs. Jordan & Brann, attorneys for W. P. Frick, defendant, and good cause appearing therefor, it is by the Court now ordered:

That all the exhibits in the above-entitled case, both plaintiff's exhibits and defendant's exhibits, be, and hereby are, allowed to be withdrawn from the files of the court in this case, said original exhibits to be returned to the files of this court upon the determination of said appeal by said Circuit Court of Appeals.

WM. C. VAN FLEET,

Judge.

Dated November 22d, 1917.

[Endorsed]: Filed Nov. 22, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [73]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,388.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. P. FRICK, JOHN DOE, RICHARD ROE and ALBERT DOE,

Defendants.

Cost Bond on Appeal and Staying Execution.

KNOW ALL MEN BY THESE PRESENTS: That the Globe Indemnity Company, a corporation organized and existing under and by virtue of the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, as surety, is held and firmly bound unto the United States of America for the full and just sum of seventy-five hundred and 00/100 ($7,500.00) dollars, to be paid to the said United States of America, to which payment, well and truly to be made, we bind ourselves, our successors, representatives and assigns, jointly and severally, by these presents.

Sealed with our seal and dated this 12th day of December, 1917.

WHEREAS, W. P. Frick et al. have appealed to the United States Circuit Court of Appeals for the Ninth District, from the decree of the District Court of the United States and for the Northern District of California, bearing date of the 7th day of Au-

gust, 1917, and made and entered in said cause on said date against said defendants W. P. Frick et al. and in favor of said plaintiff, United States of America, for the principal sum of sixty-four hundred seventy-five and 95/100 ($6,475.95) dollars, together with costs amounting to one hundred thirty and 16/100 ($130.16) dollars, and interest from the date of the decree upon said sum at [74] the rate of seven (7) per cent per annum until recovery is paid; and,

WHEREAS, said defendants, W. P. Frick et al., desires, during the process of such appeal, to stay the execution of the said decree of the above-entitled District Court:

NOW, THEREFORE, the condition of this obligation is such that if said W. P. Frick et al. shall prosecute said appeal with effect and pay all costs which may be awarded against them as appellant if the appeal be not sustained, and shall abide by and perform whatever decree may be entered against it in this cause by the United States Circuit Court of Appeals for the Ninth Circuit, or, on the mandate of said court, by the said District Court below, then this obligation to be void; otherwise, the same shall be and remain in full force and effect.

W. P. FRICK.

GLOBE INDEMNITY COMPANY.

(Corporate Seal) By S. F. NORWOOD,
Attorney in Fact.

Approved:

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 20, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [75]

In the District Court of the United States for the Northern District of California, Second Division.

IN EQUITY—No. 15,388.

UNITED STATES OF AMERICA,

Complainant,

vs.

W. P. FRICK, JOHN DOE, RICHARD ROE and ALBERT DOE,

Defendants.

Praecipe for Transcript on Appeal.

To the Clerk of U. S. District Court:

Please incorporate the following papers, documents and exhibits in the transcript of record on appeal in the above-entitled cause:

1. Bill of complaint.
2. Defendant W. P. Frick's answer.
3. Final decree of August 7, 1917.
4. Petition for order allowing appeal.
5. Assignment of errors.
6. Order allowing appeal.
7. Order allowing withdrawal of exhibits.
8. Memorandum of bond on appeal.
9. Citation.
10. Copy of praecipe.
11. Statement of evidence on appeal.
12. Opinion of Court.

13. Original exhibits (to be produced and transferred, but not printed).

JORDAN & BRANN,
Attorneys for Defendant W. P. Frick, Appellant.

[Endorsed]: Filed Jul. 31, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [76]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,388.

UNITED STATES OF AMERICA,
Complainant,

vs.

W. P. FRICK et al.,
Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing seventy-six (76) pages, numbered from 1 to 76, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing

transcript of record is $33.45; that said amount was paid by the attorneys for the defendants; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 22d day of August, A. D. 1918.

[Seal] WALTER B. MALING,

Clerk United States District Court for the Northern District of California. [77]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Second Division, wherein W. P. Frick is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the North-

ern District of California, this 20th day of December, A. D. 1917.

WM. C. VAN FLEET,
United States District Judge. [78]

Receipt of a copy of the within is hereby acknowledged this 28th day of December, 1917.

JNO. W. PRESTON,
United States Attorney,
ED. F. JARED, Asst.,
For Plaintiff.

[Endorsed]: No. 15,388. United States District Court for the Northern District of California, Second Division. United States of America vs. W. P. Frick et al., Appellant. Citation on Appeal. Filed Dec. 28, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. W. P. Frick, Appellant, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed August 29, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

W. P. FRICK,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Order Enlarging Time to and Including February 18, 1918, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the appellant in the above-entitled case may have to and including the 18th day of February, 1918, within which to file the record on appeal and docket the case in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 18, 1918.

WM. C. VAN FLEET,
U. S. District Judge. [79]

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and Including February 18, 1918, to File Record Thereof and to Docket Case. Filed Jan. 18, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

W. P. FRICK,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Order Enlarging Time to and Including March 18, 1918, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the appellant in the above-entitled suit may have to and including the 18th day of March, 1918, within which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated February 18, 1918.

WM. C. VAN FLEET,

U. S. District Judge. **[80]**

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to March 18, 1918, to File Record Thereof and to Docket Case. Filed Feb. 18, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

W. P. FRICK,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Order Enlarging Time to and Including April 18, 1918, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the appellant in the above-entitled suit may have to and including the 18th day of April, 1918, within which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 18, 1918.

WM. C. VAN FLEET,
United States District Judge. **[81]**

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to April 18, 1918, to File Record Thereof and to Docket Case. Filed Mar. 18, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

W. P. FRICK,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Order Enlarging Time to and Including May 18, 1918, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the appellant in the above-entitled case may have to and including the 18th day of May, 1918, within which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated April 18, 1918.

WM. C. VAN FLEET,
Judge. [82]

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to May 18, 1918, to File Record Thereof and to Docket Case. Filed Apr. 18, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

W. P. FRICK et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Order Enlarging Time to and Including June 17, 1918, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the appellants in the above-entitled case may have to and including the 17th day of June, 1918, within which to file the record on appeal and docket the

cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated May 17, 1918.

WM. W. MORROW,

Judge of the U. S. Circuit Court of Appeals for the Ninth Judicial Circuit. [83]

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to June 17, 1918, to File Record Thereof and to Docket Case. Filed May 17, 1918. F. D. Monckton, Clerk.

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 15,385.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. P. FRICK et al.,

Defendants.

Order Enlarging Time to and Including July 16, 1918, to File Record and Docket Cause.

Upon application of Mr. Edward F. Jared, Assistant United States Attorney for the Northern District of California, counsel for the plaintiff, and good cause therefor appearing, it is

ORDERED that the time to file transcripts of record and docket the above-entitled causes in the United States Circuit Court of Appeals be, and hereby is extended from the 16th day of June, 1918,

to and including the 16th day of July, 1918.

Dated San Francisco, Cal., June 16, 1918.

WM. C. VAN FLEET,
United States District Judge. [84]

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and Including July 16, 1918, to File Record Thereof and to Docket Case. Filed Jun. 15, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Judicial Circuit.

W. P. FRICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Order Extending Time to and Including August 16, 1918, to File Record on Appeal.

Good cause being shown, it is hereby ordered that the appellant in the above-entitled case may have to and including August 16, 1918, within which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated July 16, 1918.

WM. H. HUNT,
Judge.

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Order

Under Rule 16 Enlarging Time to August 16, 1918, to File Record Thereof and to Docket Case. Filed Jul. 15, 1918. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Judicial Circuit.

W. P. FRICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Order Extending Time to and Including September 14, 1918, to File Record on Appeal.

Good cause being shown, it is hereby ordered that the appellant in the above-entitled cause may have to and including September 14, 1918, within which to file the record on appeal and docket the cause in the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

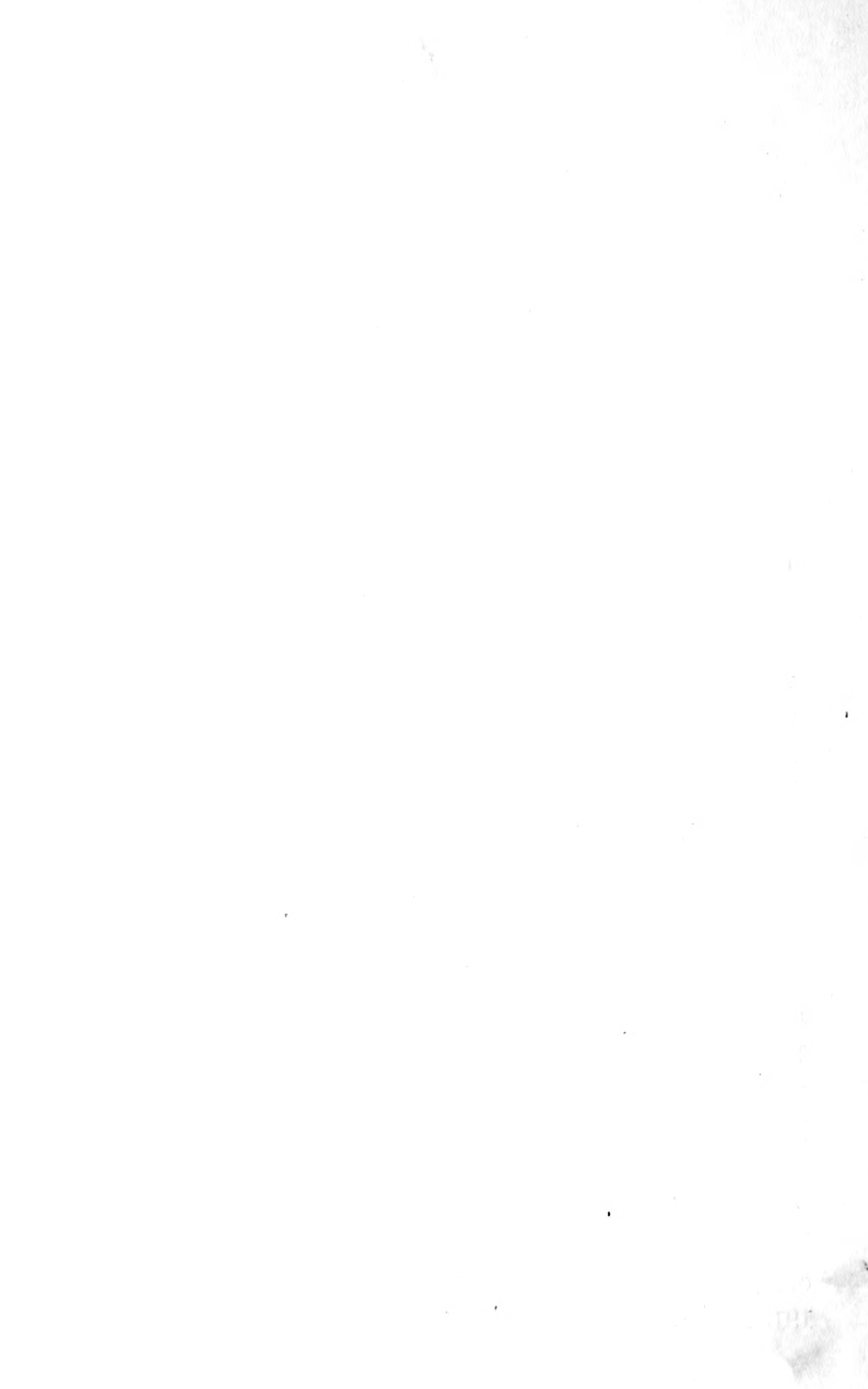
Dated August 15, 1918.

WM. C. VAN FLEET,

Judge.

[Endorsed]: No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to September 14, 1918, to File Record Thereof and to Docket Case. Filed Aug. 15, 1918. F. D. Monckton, Clerk.

No. 3206. United States Circuit Court of Appeals for the Ninth Circuit. Eight Orders Under Rule 16 Enlarging Time to September 14, 1918, to File Record Thereof and to Docket Case. Re-filed Aug. 29, 1918. F. D. Monckton, Clerk.



No. 3206

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. P. Frick,
Appellant,

vs.

The United States of America,
Appellee.

BRIEF FOR APPELLANT.

Jordan & Brann,
Attorneys for Appellant.

[illegible]-Wal[illegible] Printing Co.

No. 3206

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. P. Frick,

Appellant,

vs.

The United States of America,

Appellee.

BRIEF FOR APPELLANT.

Action in Equity. This suit was commenced upon the 27th of October, 1911, for the purpose of obtaining a decree cancelling a patent for timber land issued to one Bolling C. Robertson,—now deceased,—upon the 6th day of April, 1908, whereby the Government conveyed to Robertson Lots 3, 4, 5 and the SE 1/4 of the NW 1/4 of Section 6, Township 8 North, Range 14 East, M. D. B. & M. all lying in Eldorado County, California. The relief sought by the plaintiff is based upon the charge that the patent was obtained by fraud, in that both the application to purchase the land and the affidavit of its non-mineral character contained false statements as to the non-mineral character of the land and as to its being unoccupied.

Upon the trial in the lower court, it appeared that the land had been sold by the locator first to the defendant Frick,—who was charged as a co-conspirator with the locator in the obtainment of the patent,—and by him subsequently to the California Door Company, who is admitted to have been an innocent purchaser for value. For the latter reason the court declined to cancel the patent, but granted as a relief a judgment against appellant Frick in the sum of $6475.95, being $32.50 per acre, the full amount received by Frick for the land upon its sale to the Door Company May 25, 1911.

Facts of the Case.

From the record before the court the undisputed facts appear to be as follows:

Upon the 23rd day of August, 1907, Robertson filed in the United States Land Office at Sacramento an application to purchase the land in question under the provisions of the Act of Congress, approved June 3, 1878, and the acts amendatory thereto entitled: "An act for the sale of Timber Lands in the States of California, Oregon and Nevada, and in Washington Territory". The application was duly received, accepted and filed by the officials of the Land Office, and, upon the 28th day of October, 1907, Robertson made his final proof before the officials, and on the same date he made his payment for the land and received the recorders receipt therefor. April 6, 1908, a patent was issues by the

Government to Robertson under the provisions of the Act referred to, who a few days later sold it to defendant Frick for $5 per acre the deed being recorded upon the 22nd day of September, 1909, and Frick in turn upon the 25th day of May, 1911. conveyed it to the California Door Company at $32.50 per acre.

In the application for the patent, Robertson, after describing the land by its legal subdivisions, stated that it was unfit for cultivation and was valuable chiefly for its timber; that it was uninhabited and contained no mining or other improvements, and that he verily believed that it did not contain any valuable deposits of gold, silver, cinnabar, copper or coal, and that he had made no other applications under the Act; that he did not apply to purchase the land on speculation, but in good faith, with the object of appropriating it to his exclusive use and benefit; and that he had not directly, or indirectly, made any agreement or contract in any way or manner, with any person or persons whomsoever, by which the title which he might acquire from the Government of the United States would inure in whole or in part to the benefit of any person except himself.

With the application he filed also, as required by law, a non-mineral affidavit in which he declared, among other things, that he was well acquainted with the character of the land and each and every legal subdivision thereof, and that he had frequently passed over it; that to his personal knowledge there was not, within the limits thereof, any

vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead or copper, or any deposit of coal; that no portion of the land was claimed for mining purposes under the local customs or rules of miners or otherwise, and that no portion of it was worked for mineral during any part of the year by any person or persons; that the land was essentially non-mineral and that his application therefor was not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing it for timber purposes.

The foregoing papers, together with all the proceedings had in the Register's office, are admitted to have been regular in form, and in compliance with the Federal statute.

Upon the filing of his application for the purchase of the land, the Register posted in a conspicuous place in his office, upon the 24th day of August, 1907, notice of the application, and that there was no adverse claim to the land therein described known to his office. A notice of the application for the purchase was also duly published once a week for nine consecutive weeks in the Eldorado Republic, a newspaper published nearest the land. A copy of the affidavit of this publication, duly sworn to, was filed in the Land Office upon the 24th of October, 1907.

The time fixed for Robertson to prove up upon the land was set for the 28th day of October, 1907, and the place named was the office of the Register of the United States Land Office at Sacramento.

The time and place was likewise stated, in the published and posted notices. Upon the arrival of the time, Robertson appeared with two witnesses: Frick and Taylor, and made the necessary proof, their testimony being taken by questions and answers in the regular form. Robertson then testified, among other things, that he was personally acquainted with the described land, and each of its smallest legal subdivision; that he had been upon it a number of times, and had made a thorough inspection, the last time being October 5, 1907; that he walked over the land taking its four corners; that it was unoccupied and unimproved, and that it was not and would not be fit for cultivation, even if the timber were removed; that it was very rough, rugged and rocky, situated in a high altitude, with poor thin soil; that it was thickly covered with timber and underbrush, and that the soil rendered it unfit for cultivation; that there were no salines or indications of deposits of gold, silver, cinnabar, copper or coal upon it, and that it was chiefly valuable for its timber; that it contained sufficient quantities of timber, such as fir, spruce and pine to render it valuable for that purpose, but that it had no value for any other purpose; that he estimated the market value of the timber standing upon it at $1500, and that he had not directly, or indirectly, made any agreement, or contract, in any way or manner with any person, by which the title which he might acquire from the Government would inure in whole or in part to the benefit of any person except himself, and that he

made the application in good faith; that when he went over the land upon the 5th of October, he was in company with a Mr. Taylor, that he found the Government corners, and that he estimated that there were about three million feet of timber upon it having a stumpage value of fifty cents per thousand; that he arrived at his estimate as to the stumpage by consulting with people in the vicinity who were practical lumber men and woodsmen; that he expected to hold the land as an investment.

Defendant Frick, one of his witnesses, testified that he was acquainted with the land described in each of its smallest legal subdivisions, that he had been over it many times, having surveyed it, and was also there on the 18th of October, 1907; that it was then unoccupied and unimproved and unfit for cultivation; that it was precipitous and rocky, but that it had a good growth of timber on it; that there were no salines, or indications of deposits of gold, silver, cinnabar, copper or coal upon the land, and that it was chiefly valuable for its timber, which consisted of fir, spruce and pine; that it had no value for any other purpose whatsoever and that he was not in any way interested in the application, or in the land described, or in the timber, or other contents of the property; that in surveying he had learned the lines upon the property and that he had known Robertson a couple of years.

It was upon the foregoing testimony, and like evidence from the other witness, Ezra Taylor, that the patent in question was issued.

THE GOVERNMENT FAILED TO MAKE OUT ITS CASE.

A patent issued by the United States Government to land is a solemn instrument, and it is elementary that all such patents are clothed and wrapped about with a presumption of verity. The action being in equity to set the patent aside, the burden of overcoming this presumption clearly rested upon the Government, and the proof to warrant the court in setting aside the patent must be clear, unequivocal and convincing. The decision to vacate cannot be supported by a mere preponderance of evidence. As was stated by Mr. Justice Miller in the case of U. S. v. Budd, U. S. Supreme Court Reports, 30 L. Ed., p. 384, "we take the general rule to be that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud, or mistake in the execution of the instrument itself, the testimony upon which this is done must be clear, unequivocal and convincing, and that it cannot be done by a purely preponderance of evidence which leaves the issue in doubt". With this lamp as our guide, let us see if the evidence in this case, as shown by the record, was so "clear, unequivocal and convincing" in its character as to leave no

doubt in any unprejudiced mind as to the guilt of the locator and his witnesses.

The basic allegations upon which the Government rested its case and the controlling issues which it confidently tendered were two in number:

> 1. That at the time of entry, August, 1907, the land was valuable and known to be valuable mineral land—more so than for timber.
> 2. That the entryman, Robertson, with the connivance of his proof witness, Frick, and both with full knowledge of its minteral character and value, fraudulently sought to acquire the mineral land through a timber and stone entry. It was further alleged by the Government that the purchase of the land for its timber value was a subterfuge, and that as a matter of fact it was at the time of the location more valuable for mining than for timber, and that in truth and fact the entryman really sought to obtain the mines on the land and to work it for that purpose.

That the Government failed utterly to prove either of these fundamental allegations must be apparent.

In the case of U. S. v. Central Pac. R. R. Co., et al., 93 Fed. 871, the court made use of the following language:

> "the burden rests on the complainant to overcome the presumption in favor of the patent by satisfactory evidence, not only that the land was known mineral land *at the time the patent was issued,* but that it is chiefly valuable for mineral purposes. Evidence that gold placer mining had formerly been carried on in a stream on the tract, but that it had been abandoned as worked out prior to the date of

> the patent, and that neither at that time nor since had there been any mines on the land producing mineral and capable of being worked at a profit, is insufficient, as is also evidence of the mineral character of adjoining land."

As to the first proposition, that the land is mineral land and valuable for its minerals, the evidence adduced by the Government fails. Mr. Kingsbury, the Government expert, who as a matter of fact never had any practical experience as a placer miner in California, did some panning, or was present when a Mr. Murray did it, and they found *a number of colors of gold in the pan.* How many colors were found and in how many pans, what value these pannings seemed to give, and how much gravel of that auriferous character was found on the land, *do not appear in his testimony.* Mr. Kingsbury says that he found two shafts, one 10 feet and the other 12 feet in depth, showing some quartz veins, but he made no measurements of them, took no samples, made no assays, found no gold or indication of gold, *nor did he trace out any ledge in place.*

It must be remembered that Mr. Kingsbury is the mineral inspector for the Land Department; he is employed, and at the time he testified had for seven years been employed, as the Land Department expert in such cases as this. It was his duty to find the evidence with which to make the Government's case, and it must be presumed that he searched the land and the neighborhood for every

findable fact to prove the alleged mineral character of the land.

In the case of Alford v. Barnum, 45 Cal. 482, the court says:

> "The mere fact that portions of the land contain particles of gold or veins of gold bearing quartz rock would not necessarily impress it with the character of mineral land within the meaning of the Act referred to. It must at least be shown that the land contains metal in quantities sufficient to render it available for mining purposes. Any narrower construction would operate to reserve from the use of agriculture large tracts of land which are practically useless for any other purpose and we cannot think this was the intention of Congress."

In the case of Steel v. Tanana Mines R. Co., 146 Fed., p. 678, it is said:

> "Doubtless colors of gold may be found by panning in a dry bed of any creek in Alaska, and miners upon such encouragement may be willing to further explore in the hope of finding gold in paying quantities; but such prospects are not sufficient to show that the land is so valuable for mineral as to take it out of the category of agricultural lands and to establish its character as mineral land when it comes to a contest between a mineral claimant and another claiming the land under other laws of the United States."

The Department of the Interior in the case of Reininghaus, 1 L. D. 265, said:

> "The mere fact that portions of the land contain particles of gold would not necessarily impress it with the character of mineral land. It must, at least, appear that it contains metals

> in such quantities as to make it available and valuable for mining purposes."

Many other cases might be cited to support the proposition laid down in the foregoing citations, but we surmise that there is no necessity of going further. Mr. Kingsbury's testimony fails to show anything of value to the Government, in that it appears that the first and only examination that he made of the land was in October, 1910, *three years after the location was made,* and hence knew nothing about any discoveries of mineral upon it at the time either of the location, or the issuance of the patent. Furthermore, he gave no evidence as to the value of the land for mineral purposes found at the time of his examination; he simply says that he found "some quartz veins" which he says were small, and that the panning resulted merely in the obtaining of colors; that in his opinion the gold that he found was a "sufficient indication for a man to go ahead and develop the land with the expectation of making it pay"; that he did not recall at the time of giving his testimony whether he examined the quartz or not; that he saw in the distance,—about half a mile to the South,—that there had been considerable placer work done, and that he did not make any examination of the gravel. He admitted upon cross-examination that there was "some good timber on there—it was a timbered country."

With reference to improvements, he testified that at the time that he was there he saw a cabin, which

was several years old, and that the mining work which he saw had been done three or four years before, but *he thought* that at least *some* of the work was done before the 28th of October, 1907, and that the cabin was there before that time.

We submit that Mr. Kingsbury's testimony fails to show that either at the time of the location, or at the time of the issuance of the patent the land was more valuable for its mineral than it was for its timber. It also fails to show to any satisfactory degree that the improvements which he saw were there as a matter of fact upon the 28th of October, 1907. Surely, the Government must have more satisfactory evidence in support of the plaintiff's case than that of Mr. Kingsbury.

The next witness presented by the Government was a Mr. Mauk, who testified that the *last time he was on the land was in 1902,* that at that time Mr. Parker was running a tunnel, and he brought out a pan or two and panned it in his presence; "there was some gold in the pan, but I cannot recollect, because I was not interested. I didn't pay particular attention, but enough to know that *he had some gold in the pan".* He says that he himself never examined the gravel around this mine; that upon certain occasions prior to 1902 he and Frick were then mining together, and that they loaned Parker a monitor and some pipe and that Frick was present when they loaded it into the wagon and it was hauled away.

With reference to the tunnel Mauk says, that when he was there Parker was running a tunnel into the hill, and "that in the canyon below, where it breaks off, near where he started the tunnel there had been mining work done". It was mined there *"before Parker got the property"*; that ground sluicing had been done *lower down in the canyon* before that. He says that the ditch referred to *was built years before Parker purchased the mine,* that it was an old ditch, or a portion of it was, and that he had crossed over it many a time.

Not one word of testimony was obtained from Mr. Mauk as to the property *in the year 1907,* when Robertson proved up on his claim. We must look further then than the testimony of Mr. Mauk for that "clear, convincing and unequivocal evidence" which will warrant a court to vacate or set aside a patent.

Mr. Antone Meyer, another witness produced by the Government, testified that in 1898 he had located up in the mountains and sold timber, and since then has been in the hotel business; that he knew the Parker mine; that Mr. Parker was living there and made his living from the mine while he was there; that there were two little cabins on the ground, *but he could not tell in what year that was;* that when he was there the last time Mr. Lee Parker came in with some rock which he looked at, and that he then went down to the ground and looked at it; that he could not tell exactly how long Parker was

there; that he did some mining adjoining Parker's claim, and that the vicinity in which the Parker claim was located was known as mineral lands; that he went there to see Parker and that Parker was prospecting; that there was *a big cut below* and that they had pipe laying there. In conclusion this witness says: *"It is a good many years since I was over there, but I could not tell how many years it was."*

Not a word fell from the lips of this witness as to any minerals in the lands in question in 1907.

Another witness by the name of Mergurre was called by the Government, merely to show that the California Door Company purchased the land from Frick upon the 25th day of May, 1911, at $32.50 per acre.

Surely these four witnesses knew nothing about the property at the time of the timber location, or at the time of making the final proof. The only remaining witness produced by the Government in support of its charges was Mrs. Parker. It is upon her testimony and that alone that the Government can hope to support the judgment appealed from.

Mrs. Parker testified that she had no permanent home and that she lived with her daughters, and that at one time she *"lived upon a mine"* that was called the Parker mine; that was my husband's; he had it and I was up there with him". She says that was all the home they had and that she gave up everything and went up with him on the mine, and that he built the cabin himself "in Eldorado

County"; that she stayed there "most of eight years and more"; that *she does not remember the year when she left;* that Parker was sick, that it was "after the 1906 earthquake"; she says that they owned the mine at that time and all the time; she does not know who Parker bought the land from, but she thinks it was a man named Jones and young Mr. Meyer, and that he paid $1200 or $1300 for it. She says that they made their living from the mine for the eight years that they lived there, and had a good many hired men "because the ditch that he first dug broke before they got much out of it"; that a nephew of Parker's came up there and his own two boys, and they dug another ditch that went around another hill, but that it "did not bring them out as much as when they washed into the first canyon where they got the gold". She says that when they came back to the old place, in one or two days' washing they took out over $340, but *she does not state when this happened.* She says that Parker built the cabin for her to come up there; that it was a nice good cabin, with a cellar to put their provisions in, and that he dug a well and that they had a garden and that he bought a pump. She says her husband died three years ago last January, which would make the date of his death, January, 1913. Upon cross-examination she stated that they first went upon the property two or three years before the San Francisco fire, and then she says that Parker went there in 1902, which as a matter of fact would make it four years before the fire,

and that he dug most of the gold out *before the fire;* that "the first first he dug worked, it paid well". Just what is meant by this sentence it is difficult to determine, but we will assume that inasmuch as a ditch was referred to in the next sentence that she meant to say that the first *ditch* he dug paid well. She does not, however, say when that ditch was dug, but she does tell us that it broke, and that they then went to hydraulicking from the other ditch which they put in around the other hill, but she says "it did not pay them well". She also says, "he dug tunnels but he did not get any pay out of the tunnels"; that "it was out of the same ravine that this big lot of money was taken out at the foot of our canyon. He was hydraulicking in the bank of the creek"; that it was in the hydraulicking in the bank of the creek that he got the money. Presumably, the money referred to is the $340, of which she had spoken in her direct examination, which she says was taken out after the fire, but *she does not state how long after the fire.* She says there was a good deal of timber on the property, but not as much on the place where they got the gold; that there was good timber land near the cabin,—seven or eight big yellow pine trees—that Mr. Parker stayed there all the time, "he prospected", but that he left there *after the fire* as he was sick. How long after the fire this was she does not tell us.

We have now given the substance of all of Mrs. Parker's testimony, and we submit that there is

nothing there from which any court can determine that the property involved in this action was more valuable for its minerals than for its timber *in October of the year 1907.* It does appear that at one time while hydraulicking Parker got $340 worth of gold. It is more than likely, in fact quite evident from the testimony, that this was a mere pocket, such as miners often find in hydraulicking, and we have no evidence that any other pocket was at any other time discovered. Just when this was found we do not know, except that she tells it was after the fire, which was in April of 1906. As it was more than a year and a half after the fire that Robertson proved up on his timber claim, we submit that there is nothing in this evidence that even warrants a presumption that the property was valuable for minerals at the latter date, while all that the record shows is that the only gold that yielded tempting values may have been taken out a few days after the 18th of April, 1906, while all work done thereafter was done at a loss, and this is much more than likely from the fact that Mrs. Parker herself testified that all the time that Parker stayed there *he was prospecting;* like many another prospector, lured by the hope that he would again find ground that would pay like the pocket from which he got the $340, he toiled on, day in and day out, month in and month out, *in the hope* that he might find something of value, only to die later on of disappointment.

We now submit that the Government has not borne the burden cast upon it of showing, as the law required it to show, by "clear, unambiguous and convincing testimony" that this property to which the Government has issued a timber patent was at the time of the proof and grant more valuable for its minerals than for its timber.

In comparison with this uncertain and weak testimony of the Government, comes the strong and convincing testimony offered by the defendant Frick, who not only by his own evidence but that of his supporting witnesses, five in number, testified with the greatest particularity and certainty that at the time in question the land had practically no value for its minerals, but was valuable for its timber. It will be observed that none of these witnesses has been impeached, nor did the Government ever attempt to impeach them.

Mr. Frick testified that he was one of Robertson's proof witnesses in October, 1907, and that just prior to the giving of his testimony before the Government officials he went over the property; that he found the section corners; that he followed the section line and ran south on it and got down to the section next, the southwest corner of section 6, and that he came over the quarter stake on the south line of this section and ran north then to the quarter stake, taking in both sides of this property, the east and west sides; that he went through the property for the purpose of ascertaining whether it was timber land; *that he knows positively that this was not*

mining land, and that he knows in that section of the country *there are no paying mines;* that he, in connection with Mr. Mauk (the Government witness) tested that out in the immediate vicinity, and proved conclusively that there could be no mines developed, the land was timber land and covered with a good growth of timber, averaging in the neighborhood of 25,000 feet per acre; that the gulches *had been mined out in the early days* all through that section of the country by placer methods and by ground sluicing; that he paid Robertson $5 per acre for the land a short time after he got the title; that in 1902 he and Mr. Mauk had mined in that vicinity, but the mining proved a failure, he did not make any money out of it, and that he was satisfied at that time that there were *no minerals in that district in paying quantities;* that at the time that he gave his testimony as a proof witness he did not know that there was a house upon the property, or that there had been a shaft sunk, and that he did not know that Mr. Parker was living there, but so far as he knew, it was unoccupied; that there might have been a cabin in the gulch which he might not have seen, but there was no indication of deposits there, and no indications of value whatsoever that he saw; that at one time he and Mr. Mauk loaned a monitor and some pipe to Mr. Parker, but that *he did not know that it went on that property;* that Robertson knew that he, Frick, was in the timber business and that he purchased from Robertson nine or ten days after he

We now submit that the Government has not borne the burden cast upon it of showing, as the law required it to show, by "clear, unambiguous and convincing testimony" that this property to which the Government has issued a timber patent was at the time of the proof and grant more valuable for its minerals than for its timber.

In comparison with this uncertain and weak testimony of the Government, comes the strong and convincing testimony offered by the defendant Frick, who not only by his own evidence but that of his supporting witnesses, five in number, testified with the greatest particularity and certainty that at the time in question the land had practically no value for its minerals, but was valuable for its timber. It will be observed that none of these witnesses has been impeached, nor did the Government ever attempt to impeach them.

Mr. Frick testified that he was one of Robertson's proof witnesses in October, 1907, and that just prior to the giving of his testimony before the Government officials he went over the property; that he found the section corners; that he followed the section line and ran south on it and got down to the section next, the southwest corner of section 6, and that he came over the quarter stake on the south line of this section and ran north then to the quarter stake, taking in both sides of this property, the east and west sides; that he went through the property for the purpose of ascertaining whether it was timber land; *that he knows positively that this was not*

mining land, and that he knows in that section of the country *there are no paying mines;* that he, in connection with Mr. Mauk (the Government witness) tested that out in the immediate vicinity, and proved conclusively that there could be no mines developed, the land was timber land and covered with a good growth of timber, averaging in the neighborhood of 25,000 feet per acre; that the gulches *had been mined out in the early days* all through that section of the country by placer methods and by ground sluicing; that he paid Robertson $5 per acre for the land a short time after he got the title; that in 1902 he and Mr. Mauk had mined in that vicinity, but the mining proved a failure, he did not make any money out of it, and that he was satisfied at that time that there were *no minerals in that district in paying quantities;* that at the time that he gave his testimony as a proof witness he did not know that there was a house upon the property, or that there had been a shaft sunk, and that he did not know that Mr. Parker was living there, but so far as he knew, it was unoccupied; that there might have been a cabin in the gulch which he might not have seen, but there was no indication of deposits there, and no indications of value whatsoever that he saw; that at one time he and Mr. Mauk loaned a monitor and some pipe to Mr. Parker, but that *he did not know that it went on that property;* that Robertson knew that he, Frick, was in the timber business and that he purchased from Robertson nine or ten days after he

made his final proof; that he met Robertson in Oakland the first time in the summer of 1906; that Robertson was then a real-estate dealer and offered to him some lands for sale; Robertson at that time was buying timber land as the agent of a Mr. Jacobi, and had an office in the same building in which Frick's office was, that Robertson asked him if he would act as a witness for him and he promised to do so as he knew the land and was familiar with that district; that there was no agreement or understanding between them at the time that he, Frick, should purchase the property. He surveyed that property in 1904, and at that time there were some abandoned cuts which they occasionally ran into, *such cuts as are found all through that timbered country, being marks of early day prospecting;* that he did not consider old abandoned mining cuts as evidence of any improvements; that if as a matter of fact he saw a cabin there at any time it must have been a good many years ago, and that he did not know whether he would pay any attention to it, as they were little old shacks all through the country used by old miners who prospected through that country; he says that Robertson came to him shortly after he made his proofs; that he was a sick man, his physician having stated that he had Bright's disease and could not live very long; that he then stated to him that he would like to have him buy that land, and he replied that it would depend a great deal upon what Robertson was willing to sell it for as he would probably have to hold it for sometime before

he could sell it; that Robertson replied that he did not know who he could sell it to unless Frick would buy it. Robinson finally made a price that was a sufficient inducement, and he bought it.

Dr. J. C. Anthony, testifying for the defendant stated that he knew Lee Parker, Sr., that he first met him in San Francisco sometime before the 1906 fire, and that he visited the land that he had in Eldorado County, where he claimed he had a mining claim with a Mr. Holbrook and Mr. Chappell; that they found there some prospecting holes, that the property had been represented to them as mining property and they agreed to purchase it if it was as represented, that they found nothing there to warrant the purchasing of the property, that Parker's son was there on the property and had a Little Giant at work there and was barely making a living. The samples and things that came through Mr. Chappell who remained on the property *did not show any values at all.* He says that *there was absolutely no earmarks of a mine anywhere,* that the only thing was the little sluicing he was doing down in a gulch. He says he was there in 1907, he thinks in the month of February. He stated upon cross-examination that he had been born and raised in mines, that his father was the original discoverer of copper on Lake Superior; that the boy (Parker's son) told him that he was barely making a living there—the witness did not see his clean-up. He tells us that there was a cabin there, with three rooms and a big fireplace; that there was another

cabin which had been built for another piece of property but not on this land—it was in a little depression there. The cabin was not more than 200 or 300 yards from where they were mining. He says that *the only thing of any value that they could see was what timber there was upon the land;* that there was some very good timber on it; that the only thing that was working there at the time of his visit in 1907 was the hydraulicking.

> "Q. Did you see any values there that attracted you at all, placer or otherwise?
>
> A. *None whatever.* We turned the property down flat. The land was not such as would warrant us in spending any money as miners in developing it. We went over all the property where he told us that there was any mining developments and did panning—there was no indication there, there was no lead, there was nothing there that any mining man would want. We brought samples back. I think we only panned in three places—all the places he showed us and that he claimed to be mining property. Those samples didn't show anything—a few cents—none of them went 50 cents a ton."

He says that it was the quartz that Parker laid so much stress upon, that he stated that he had property there that contained platinum, and he brought some samples down that Parker said there was platinum in, but there proved to be nothing in it. All this he stated was in the month of February, 1907.

Ezra Taylor, another witness produced by the defendant, testified that he was one of the proof

witnesses when Mr. Robertson got the property and had known it for twenty-five years, and had passed over it and mined around in that vicinity, and that he was last on the property in the year 1907, *about a week before Robertson proved up on it,* with Mr. Robertson; that there had been some mining done there, but he did not see anybody mining on it when he was over there.

> "Q. Do you know whether there was anybody mining there
> A. There was nobody mining there."

He says that it looked as if there had been a good deal of ground sluicing done; that there was one place there where they had worked a cut up there, and it had caused a landslide, which slid a lot of ground out, and from the looks of it the high water had washed it more and caused it to look like quite a bit of mining had been done there, but the cut was mostly from the slide. He stated that there was an old unoccupied mining cabin there but he did not go into it *and it did not look as if there was anybody in there;* said it was a small house and he *supposed it to be abandoned.* He said that he mined there in the mouth of that gulch; that one winter four of them worked there shoveling in sluice boxes; that *after working there a month they made $40,* and that he *never heard of any profitable mining being done around that neighborhood, not of late years;* that he supposed there had been in early days; that the ground sluicing he saw was done before 1907, and that the nearest paying mine was

forty miles distant, at Plymouth, and was known as the Plymouth Consolidated Mine. He also says that the land is very good timber land, having some sugar pine, some fir, some cedar and yellow pine. When asked how long prior to 1907 there had been ground sluicing done there, he says that he thinks 1906 was the last time they worked in there, but he was not positive; that he does not think there was any mining done there since 1907; that the land was more valuable for its timber than for mining; that he never noticed or saw any gravel there; that in going down upon the west side of the line one could not see the cabins; that you could not see them from the east side either, as there was too much timber; that you would have to get pretty close to them in order to see them on account of the timber; that the cabin is in a basin, and about it there was what they called "buck brush". He did not think that the cabins could have been seen from where the mining work had been done. He further stated that at the time he gave his testimony as a proof witness he regarded the improvements that he had seen upon the property *as abandoned improvements.* "You can go to almost any quarter section up there and you will find some cabin or house". He did not go into the house to see whether there were people living there; he never saw Parker working the mine; that he had been upon the property three or four times a year for twenty-five years; that he was riding after cattle through that country and during all that time he never saw Parker doing any mining.

Robert White, another witness called on behalf of the defendant, testified that he was familiar with the land about the year 1907 and before that time; that he lived on that same section and owned a forty acre lot there and had a homestead there since 1904 or 1905; that he saw Parker on that land about twelve years ago, namely, in 1906, and that he crossed the land several times during the summer each year. He says that there might have been a little mining done there in 1906, that Mr. and Mrs. Parker were living there in 1906, *during the summer time,* but he does not know that there was any one there in 1907; that there was a blind road which passed up above the house and one could not see the house from this road, but there was a trail from the road to the house.

Mr. Seymour Hill, one of defendant's witnesses, testified that his business was mining principally; that he examined the property in controversy on May 7, 1916, with regard to determining whether or not it was mining property; that he saw a hole, but could not say how deep, but from the dump he supposed perhaps 4 feet deep, or something like that, and another one a little further up the hill, perhaps 7 or 8 feet; that he looked for quartz, as they were evidently sunk for quartz; that there was a little quartz on the dump, blisters of quartz, and that he took some of the best looking rock he could see from each place and took them home and pounded them up to see, *and he didn't get anything out of them at all;* that a little further over, be-

tween the cabins and those holes, there was evidence of some surface mining; he thought at the head of where it had been sluiced out it was 150 feet wide, or perhaps a little longer; that he went down into those cuts and followed them down the creek that goes south from the river, until he was satisfied he was off of that ground; *that he did not see any quartz gravel, or, in fact, any kind of gravel at the upper end where they had been mining;* said it was just like a big washout that there will be in any of those granite mountains. In fact, he says *he did not see any evidence of anything that would make either a gravel or a quartz mine,* and that *in his opinion the land was not valuable for mining.* He said there was no evidence of any ledge there, and he saw no evidence of a mine, nor anything which would warrant a man in expending his money in developing it. He says that his impression was from what he saw, that there had been a little ravine, perhaps 8 or 10 feet wide, that at some time or other had gold in it, but that it had been washed out, and they followed it up into the mountain, where there was absolutely nothing. Those ravines, he says, occur in the country around about there; that the land showed no evidence of mining having been done upon it recently; that the shaft that was there had all caved in so that no one could go into it. He stated that there had been mining done there in the past.

Mr. Norris English, the last of defendant's witnesses regarding the matters now being considered,

testified that he was a mining engineer of large experience, having graduated from the University of California and pursued his profession ever since. He had spent considerable time in mining in the vicinity of the property in question, and made an expert examination of it on the 5th and 6th of May, 1916. Having described the character of the formation and the cuts and shafts, he spoke of a stringer of quartz which he measured, of which he took a sample, and had it assayed, but *it showed no values in gold or silver.* The first assay he said showed a trace in gold or silver amounting to about twenty cents a ton, which was a negligible valuation. Further down the slope, he says, the ditch runs on below that, about 2 or 3 feet in the section, and that at the bottom of the ground sluice there was an old windlass which was sunk down on a slip in the granite. This excavation he says did not show any gravel—it was merely an excavation in soil and decomposed bedrock. He says that the principal work on the property had been done about 200 feet south of the most westerly cabin, and consisted of a ground-sluice, or a sluice that had been carried up from the ravines 1000 feet or more down below the cabin up to within 40 or 50 feet of the ditch; that the upper part of the cut had been worked out by the use of a small giant, which took water out of the ditch, and which was connected by a string of eight inch pipe, there being some of that size on the ground. He says that this excavation in no place shows any gravel; that he

particularly examined the coarse rocks that had been piled out and thrown out of this trench, so as to give the water a chance to cut, and found no washed gravel, that the entire cut was in soil which was principally a decomposed lava, which makes a deep, red soil, and below that in decomposed granite. He says that on section 31, adjoining the property in question, and a quarter of a mile beyond the point where the ditch comes into this property, there had been a tunnel run and there was some quartz lying around the dumps, but this quartz only occurs in spots here and there; that there was no distinct ledge, and no continuous outcrop, and no indications that the ledge would become continuous in depth. He says that there was absolutely no gravel on the property, and that there was absolutely no indication that *would warrant a prudent man in making any expenditure there to develop a mining property;* that a man could not make anything from working that land in the way of profit in mining; that he had panned the sides of the principal cut in five different places in order to find out if the decomposed bedrock and soil carried any values, and he did not get any colors in any one of the five pans and he says he thinks anything that may have been there in the early days had been exhausted. He then says:

"Around the principal ground sluice as to which I have testified, there are second growth pines that I suppose are anywhere from five to ten years old; they are an inch and an inch and a half in diameter. Further on down, in

> a place where the water from a spring runs, there are alders, about 4 inches in diameter, that have grown there since mining stopped. I don't think any mining had been done there inside of 10 years, except a little prospecting around with a pan. I think the shafts were sunk with the idea that the quartz would become larger and richer with depth, but there are no indications of any values of quartz on the surface, of any size that would make a mine. * * * I put in 12½ hours, and from my examination I could go back and read back for eight or ten years, *and say that no mineral of any consequence had been brought out of that ground.*"

We have now reviewed all of the testimony given by both plaintiff and defendant so far as the same relates to the character of the land in question, and we confidently submit that the testimony of the Government has failed to show that at the time of the final proof or of the issuance of the patent the land was more valuable for its minerals than for its timber, but that upon the contrary the evidence of the defendant shows conclusively that it had practically no value as mineral land, but had considerable value for its timber.

NO MERIT IN GOVERNMENT'S CASE.

In addition to what we have already stated, we now desire to call the court's attention to a defect in the testimony of the plaintiff, which, in our opinion, entirely strips the Government's cause of all merit. As we have already stated, the only evidence

upon which it is possible for it to hang the faintest glimmer of hope is that of Mrs. Parker, and we have shown that even she gave no testimony as to the character of the land in October, 1907, when the patent was issued. Not only is this true, but it is a remarkable circumstance that she gave *no evidence at all touching the particular land in question.* The only property regarding which she testified was described by her as "a mine" belonging to Mr. Parker, upon which they had a cabin, and which mine was known as the "Parker Mine". Unfortunately, the Government did not attempt to show that this Parker mine, upon which the cabin was located, and from which Mrs. Parker stated they obtained gold in the early days, *was any part of the property described in plaintiff's complaint.* Mrs. Parker says that this mine and cabin were in Eldorado County, and that she stayed there most of eight years, and that Parker subsequently got sick and they left. This was after the earthquake. Plaintiff's own evidence shows conclusively that Parker had located two other mining claims in Eldorado County, either of which might have been known as the "Parker mine" and might have been the one on which Mrs. Parker lived with her husband—one of these locations was made upon the 27th day of September, 1904, and was known as the "Lost Ledge Quartz claim" (see plaintiff's exhibit 12 page 9), and the property is described by stakes and monuments, no reference being made to Government subdivision, but it was

in Mount Pleasant mining district, Eldorado County. There is no possible way of identifying this property with the property described by the plaintiff. Another mine was located by Parker upon the 24th day of September, 1904, in the same district, but that appears to have been in Section 31, Township 9 North, Range 14 East, whereas the property described in plaintiff's complaint is in section 6, in the same township and range. This location is designated as "Lost Ledge" claim. This does not appear to be a relocation (Plaintiff's Exhibit 4).

It is true that Parker is described in the two locations which we have just described as Leondas Parker, whereas in the record he is spoken of as L. Parker, but when he filed his proof of labor upon each of these claims he signed his name as L. Parker (see plaintiff's exhibit 12, page 17). There can be no doubt, therefore, that Leondas Parker and L. Parker are the same person, and since these locations ante-dated Mrs. Parker's going up to Eldorado County to make a home upon "a mine" belonging to her husband, it is simply impossible for the court to determine whether the mine to which she refers, and upon which she lived, was the one described in plaintiff's complaint, or one of the other two locations referred to in the record, and since all presumptions of law must support the validity of the patent until the contrary, "by clear, convincing and unequivocal testimony" is established, it much follow that so far as Mrs.

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Parker's testimony is concerned the plaintiff's case as against the validity of the patent must fall.

If, however, the Government in reply shall say that Mrs. Parker's testimony shows that the claim upon which her cabin and the mine to which she refers was located was a purchased claim rather than a located claim, then the record is still against the Government, since she says that she thinks the claim was purchased from two persons, named Jones and Meyer, and the Government has failed to show in the record any connection between any property owned by Jones or Meyer and the property described in the complaint, whereas it does show that one G. W. Meyer and Oscar T. Jones together with several other persons located upon the 13th day of January, 1902, a large piece of mining ground in this same township, the size of which was 1320 feet in width, by 5280 feet in length (Plaintiff's Exhibit 12, page 2). This land, however, was in section 5, and not in section 6 described in the complaint. Furthermore the record contains the probate proceedings in the estate of Meyer, of which Jones was the administrator, and among the properties owned by Meyer is a large number of mining claims in this particular district. Since, then, the record does show that two men by the name of Jones and Meyer did own mining property in Eldorado County, from which Parker may have made his purchase, but which was located in an entirely different section than that here involved,

it follows that the claim referred to by Mrs. Parker upon which her husband mined and likewise the cabin may have been located in section 5 instead of section 6, and it was up to the Government, after having introduced this evidence, *to show to the contrary*. The burden of clearing up this ambiguity was not cast upon the defendant.

We submit, therefore, that the record fails to support the judgment obtained by the plaintiff, and as a further evidence of that fact we now desire to call the court's attention to

The Law of the Case.

It is settled law that where lands may have once profitably produced mineral values, and at that time were correctly classed as mineral, they lose their mineral character when they cease to pay, and that the question of mineral character is to be determined by the mineral value and workableness at the time of the grant, regardless of previous mining history.

Hunt v. Steese, 75 Cal. 624;
U. S. v. Central P. R. Co., 93 Fed. Rep. 873;
Colorado Coal and Iron Co. v. U. S., 123 U. S. 328;
Richards v. Dower, 81 Cal. 54;
Iron Silver Co. v. Mike & Starr Co., 143 U. S. 404;
Standard Quicksilver Co. v. Habishaw, 132 Cal. 123;
Davis v. Weibold, 139 U. S. 522.

The mere fact that Robertson and his witnesses did not see the mining improvements put upon the property by Parker did not of itself constitute fraud, or warrant the court in setting aside the patent.

Chormicle v. Hiller, 26 L. D. 9;
Andrew v. Stuart, 26 L. D. 265.

Abandoned cabins, houses, clearing, or other improvements of settlers who once occupied public land and afterwards left it, cannot be considered a possession or occupancy which excludes such land from selection under the mining act.

Smelting Co. v. Kemp, 104 U. S. 655;
Andrew v. Stuart, supra;
Miller v. McMillan, 10 L. Ed. 160;
Ward v. Fitzpatrick, 14 L. D. 415.

A mere preponderance of evidence which leaves the issue in doubt will not be sufficient to support a judgment cancelling a patent.

U. S. v. Budd, U. S. 36 L. Ed. 386.

The mere fact that Frick bought the property in question from Robertson a few days after he obtained his patent is not in itself any evidence of collusion, conspiracy or fraud. As the court stated in the last case cited above:

> "The Act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the Government, or restrict in the slightest his power of alienation. All that it denounces *is a prior agreement,* the acting for another in the purchase. If when the title passes from the Government no one save

> the purchaser has any claim upon it, or any contract or agreement for it, the Act is satisfied."

The Government in the case at bar did not attempt to show that there was any agreement between Robertson and Frick which was made prior to the obtainment of the patent, or that the patent was obtained by Robertson for the benefit of any one but himself.

The record shows that young Parker a son of L. Parker and of Ellen Parker worked upon the ground with his father, at least for a portion of the time that the father was there. If any one could have given satisfactory testimony with reference to the character of the land and its mineral value young Parker would seem to be that one. The Government failed to call him, nor did it give any reason why it so failed, and the presumption must therefore be that if he had been called his testimony would have been unsatisfactory.

U. S. v. Budd, supra.

The question of the mineral and timber values of the property here involved was properly presented to the Register at the time of the application for the patent, and it must be presumed that from the testimony submitted, in the absence of fraud, the judgment of the Register and of the Land Department of the Government was right. As was said in the Budd case above cited:

> "In the absence of fraud, or some other element to involve the jurisdiction and powers of a court of equity, the determination of the land

officers as to the fact whether the given tract is or is not fit for cultivation is conclusive.''

We trust the court will not lose sight of the fact that notice of the application for the patent was duly posted in the office of the Register, and *also published for more than two months* in a newspaper circulated in Eldorado County, nearest to the land. This is shown by the record. Notwithstanding these notices so posted and published, no one appeared at the office of the Register to oppose the granting of Robertson's application. Surely, if Mr. Parker, or anyone else, at that time knew that the land was more valuable for minerals than for timber, or that he had any prior rights, then it was his duty to appear at the Register's office and show cause why the application should not be granted. This he did not do. A fair inference from Parker's failure to appear and object to the issuance of the patent would be, that he had either abandoned the premises and gone elsewhere, or that he did not regard the land of sufficient value for mining purposes to warrant his objecting.

We have a further objection to this judgment to which we now call the court's attention. It appears that the land described in the complaint aggregated about 200 acres. Just where, upon this land, if anywhere, Parker did his mining we do not know. Surely, as there is no evidence that there was more than one claim, he could not have covered the entire ground. What portion of it he worked in the early days we are not told. The judgment

of the court awarded damages at the rate of $35 per acre *for the entire tract,* that being the price which Frick obtained for it in the sale to the California Door Company in May, 1911, *nearly three and one-half years after the patent was issued.* If in any view of the case the Government was entitled to a money judgment against Frick, it should only have been for that portion of the land which was more valuable for its minerals than for its timber *at the time of the grant,* not years afterwards. Furthermore it should have been for only about twenty acres of ground, which is about one-tenth of the total amount described in the complaint. As to the balance of the land, or nine-tenths, the Government offered no testimony to show that it was mineral land, whereas the defendant's testimony clearly showed that *all of the land* was timber land. If the Government suffered any damage by reason of any wrong done by Robertson or Frick it was not a damage to any other than the twenty acres covered by the mining location, and this damage must be measured by its value in 1907, not in 1911. For this land Frick received $35 per acre, and in no view of the case would the government be entitled to any more than Frick got *for that particular piece* which would not amount to more than about $700. As to the balance of the land, it being timber land, the Government has already received its full value and hence has suffered no damage. In calling the court's attention to this phase of the case, we do not desire to be deemed as waiving our objection to any damage judgment whatsoever.

By the Act of March 2, 1896 (29 Stat. 42, 43), it is provided that the amount that may be recovered as damages by the Government in an action of deceit for the conversion of lands obtained by fraudulent entry is limited to the minimum Government price of the lands. Any possible recovery therefor would be the actual damage limited by that valuation. In other words, the Statute has declared that the Government in such cases is never damaged more than the Government price of the land. As here the Government has received its price upon issuing its patent, it cannot be damaged in an amount above that price, and now has no money claim against the defendant Frick in any event or upon any theory.

> Southern Pacific v. United States, 200 U. S. 353.

Again let us suppose that the case at bar was properly on the law side of the court, and that the bill filed had been properly framed for an action of deceit and duly answered and that the trial which has taken place was had accordingly. We come then to a consideration of the proposition whether or not the Government has made a case for damages for fraud. It is elementary, of course, that to make such a case, the plaintiff must plead:

> "(1) That defendant made a material representation; (2) That it was false; (3) That when he made it, he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) That he made it with the intention that it should be

acted upon by plaintiff; (5) That plaintiff acted in reliance upon it; and (6) That he thereby suffered injury."

20 Cyc. of Law and Procedure 13.

"Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery."

Cyc., supra.

"While there is no definite standard by which to determine whether a fraudulent misrepresentation is material, a working rule has been laid down as follows:

If the misrepresentation be such that had it not been made the transaction would not have been entered into or completed, then it is material; but if it be shown or made probable that the same thing would have been done in the same way if the misrepresentation had not been made, it cannot be deemed material."

20 Cyc. of Law and Procedure 23.

Not only has the Government fallen far short of either pleading or proving all of the facts necessary to such a case, but it has failed in every single particular.

The representations charged against the entryman and defendant Frick are that he said the land was not mineral land and had no improvements on it. The first of these respresentations was true, and the second, if not literally was practically true and was immaterial. But even if these representations were false, there is not a particle of evidence to show that the entryman or Frick knew them to be false, and they plainly were not recklessly made,

for it was quite reasonable for anyone to consider the land non-mineral, or to have failed to notice the so-called mining improvements, or to have disregarded them as improvements, because they were abandoned. Furthermore, the Government has suffered no injury, because, the land, if non-mineral, brought its full and fair price, and the Government's valuation was met to the last dollar.

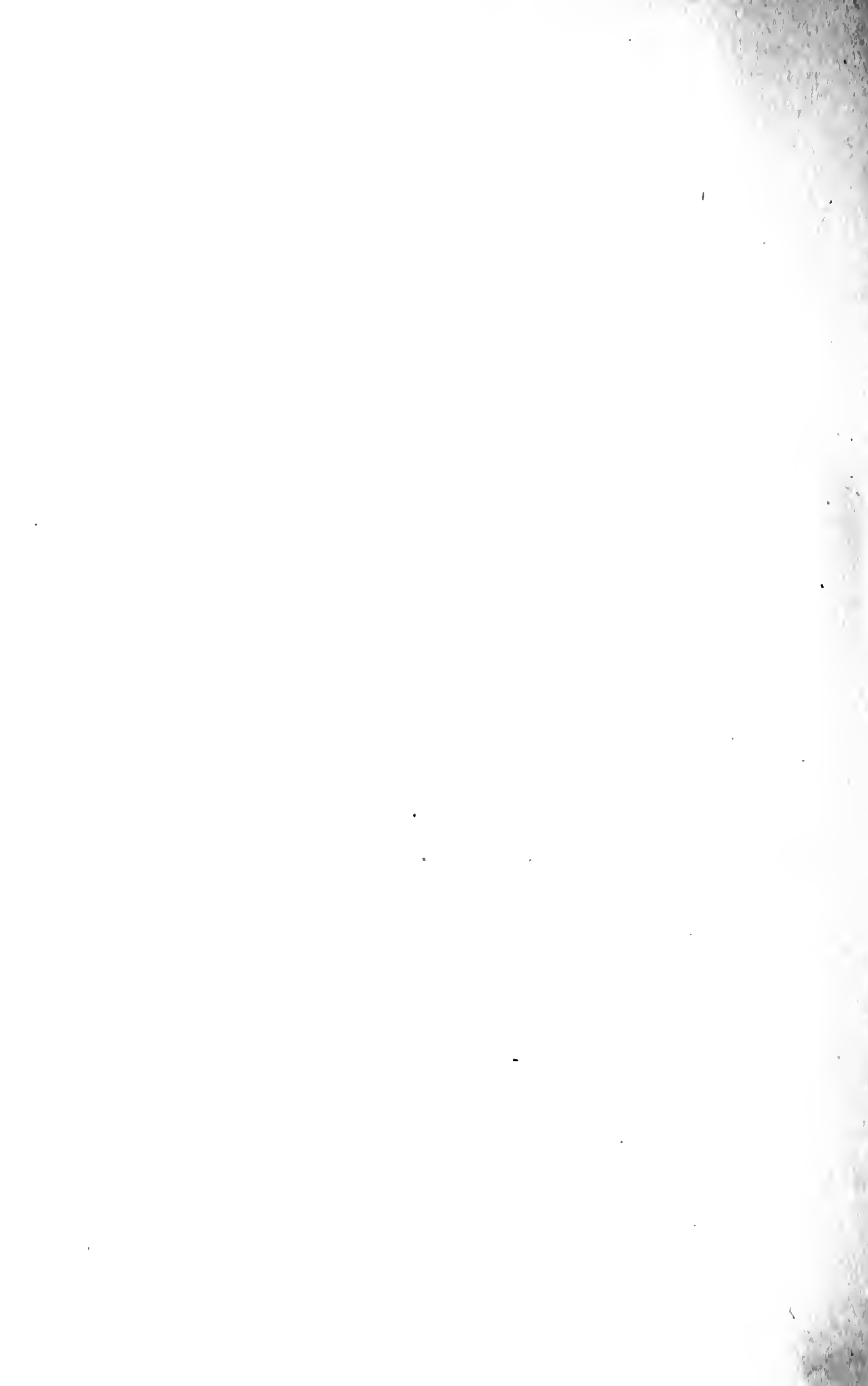
All the presumptions are of innocence, of honest purpose and truthful representations by the entryman and his witnesses, of belief in the truth of statements made, and of unconscious mistake, where mistakes were made. All these presumptions stand steadfastly to the support of a defendant in an action of deceit until dispelled by proof, which proof, as we have seen, must be "clear, unequivocal and convincing". All these presumptions still stand protectingly about this defendant—the Government has not demolished a single one of them, nor, indeed, made any serious attempt to do so.

Boddy v. Henry, 113 Iowa 462; 85 N. W. 771;
Ley v. Met. Life Ins. Co., 120 Iowa 203; 94 N. W. 568;
Lovelace v. Suher, 93 Mo. App. 429; 67 S. W. 737;
Brackett v. Griswold, 112 N. Y. 454; 20 N. E. 376;
Holdom v. Ayer, 110 Ill. 448;
Warfield v. Clark, 118 Iowa 69; 91 N. W. 833;
Lamberton v. Dunham, 165 Pa. St. 129; 30 Atl. 716;
Toner v. Meusdorffer, 123 Cal. 462.

In conclusion we respectfully submit that the judgment of the District Court should be reversed.

Dated, San Francisco,
November 20, 1918.

JORDAN & BRANN,
Attorneys for Appellant.



No. 3206.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

W. P. FRICK, *Appellant,* vs. THE UNITED STATES OF AMERICA, *Appellee.*	

BRIEF FOR APPELLEE.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed
JAN 2 - 1919
F. D. Monckton,
Clerk.

ANNETTE ABBOTT ADAMS,
United States Attorney,

FRANK M. SILVA,
Asst. United States Attorney,
Solicitors for Appellee.

No. 3206.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

W. P. FRICK,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE.

Statement of the Suit.

This is a suit in equity by the United States seeking relief on the ground of fraud alleged to have been committed in the procurement of a patent to certain public lands therein described, under an application to purchase them as timber lands, the substance of the material averments of the bill being that the application was made by one Robertson, from whom the defendant Frick purchased; that the fraud consisted in false representations and statements made in the

sworn application and the testimony given before the land office by both Robertson and Frick, the latter appearing as a witness therein, on behalf of the applicant as to the character and state of the lands, in this: that it was represented both in the application and in a non-mineral affidavit filed therewith, and in the testimony given on the hearing, that the applicant and witnesses had personally examined the land; that it was unfit for cultivation, but was valuable cheifly for its timber; that it was uninhabited and unoccupied and that it contained no valuable deposits of gold, silver, cinnabar, copper, or coal, and that there were no mining or other improvements thereon; that these statements and representations were false and known to the applicant and said Frick, when made, to be false, and were fraudulently made solely for the purpose of deceiving the land officers of the United States and inducing the issuance of the patent; that it was the fact, and was known to both Robertson and Frick, that the lands had always been more valuable for mineral than for timber and that for a long time prior thereto, and at the time of the entry of Robertson, and the issuance of the patent, and at the time of the purchase of the land from Robertson by Frick, there were located on the land gold quartz and placer mining claims owned by one L. Parker of Grizzly Flat, the location of which appeared upon the records of the Recorder of El Dorado County, wherein the

land was situate, and that on a portion of said lands there were several thousand dollars' worth of mining improvements owned by the said Parker; that these facts were well known to the applicant Robertson at the time he made his application and procured the patent and were fully known to the defendant Frick at the time he gave the testimony and when he made the purchase of the lands; it is alleged that after the transfer of the lands to Frick, Robertson died and that Frick has since held the title to said lands and claims the same and the whole thereof, and that the said claim and the patent constitute a cloud on the plaintiff's title.

The primary relief asked was that the patent be held void and set aside and the lands restored to the public domain and coupled therewith there was a general prayer that the complainant have such other and further relief as may accord with the principles of equity.

Frick answered denying the averments of fact counted upon as constituting fraud and alleged that since prior to the commencement of the action he had ceased to have any interest in the land.

It appeared upon the trial in the lower court that the land had been sold by Frick to the California Door Company, which company was admitted to have been an innocent purchaser for value. For the latter reason the Court declined to cancel the patent but granted as relief a judgment against appellant

Frick in the sum of $6,475.95, being $32.50 per acre, the full amount received by Frick for the land upon its sale to the California Door Company.

As appellant has attacked the sufficiency of the evidence to sustain the judgment of the lower court, we feel it necessary to review as briefly as possible the testimony of the several witnesses called for the appellee and the appellant in the trial court.

This review of the evidence, however, will be made as we proceed with our argument on the questions involved. Through that argument we will endeavor to bring to the Court's attention all the testimony produced at the trial.

ARGUMENT.

Two questions are presented for determination on this record.

(1) Does the evidence sustain the charge of fraud against the defendant Frick, and if so, (2) is the Government entitled, in this form of action, to recover the value of the land in money damages as compensation for the fraud through which it has been deprived of its land? The lower court found in the affirmative on both these questions and it will be our purpose to point out wherein and why the decision of the lower court should be affirmed. We shall and do maintain that the evidence introduced at the trial is amply sufficient to sustain the decree; that the

findings of the lower court on a question of fact are presumptively right and will not be disturbed unless an appellate court can clearly see that the decree is opposed to the weight of the evidence; that different, unprejudiced minds might with equal reason draw different inferences and reach different conclusions, but where the lower court has considered conflicting evidence and made a finding thereon, the finding will be permitted to stand, unless obvious error has intervened in the application of the law or some serious and important mistake appears to have been made in the consideration of the evidence; that where the court below, in an equity suit, on a full consideration of all the proofs, comes to a conclusion on a question of fraud, this Court will concur with the court below, although the evidence raises some doubt; that a decree cancelling a patent on the ground that the entry was fraudulent will not be disturbed on appeal where the evidence offered in behalf of the defendants is outweighed by the inferences to be drawn from their conduct, and finally that the evidence introduced in support of complainant's bill of complaint is clear, unequivocal and convincing and that the Government is entitled in this suit to a money judgment, the defendant having parted with title to an innocent purchaser for value.

POINTS AND AUTHORITIES.

I.

THE EVIDENCE IS AMPLY SUFFICIENT TO SUSTAIN THE DECREE.

It seems to us that the questions involved here are elementary and that there is more fact than law involved. An examination of the evidence by the legal mind should be sufficient to determine the issues without the aid of legal authority. Counsel for appellant lays stress on the fact that in cases of fraud, when it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument, itself, the testimony upon which this is done "must be clear, unequivocal and convincing and that it cannot be done by a purely preponderance of evidence which leaves the issue in doubt." Several cases are cited in support of this principle and with that principle we have no just cause of complaint. But we submit that the rule relied on is a measure or rule for the court trying the case to use in determining whether fraud has been committed. It is notice to the trial court that the evidence in a case of fraud must be "clear, unequivocal and convincing," and that no other measure will come up to the standard required. The fact that the trial court found in favor of the Government is indicative of the fact that the Court found the evidence, on the question of fraud, to be "clear, unequiv-

ocal and convincing." Counsel raised the question of a preponderance of the evidence as not being sufficient and to this we say the lower court must have considered that the testimony for the defendant was not of any weight whatever. Certainly the record shows no abuse of discretion on the part of the trial court. The witnesses were all before the Court. He had an opportunity of observing their demeanor on the witness stand, their motives for testifying and their interest, if any, in the result. It was for him to say who was to be believed and for him to disregard the testimony of such witnesses as did not produce conviction in his mind. We submit that an examination of the testimony will show that the Court could not have come to any other conclusion than the one expressed in the opinion of the Court and we believe that said opinion is the best answer to counsel's argument in the premises. As the Court truly states "all the evidence introduced in behalf of the defendant was of a negative character." We shall quote from the proceedings and testimony, as briefly as possible, to assist this Court in seeing clearly that the evidence was sufficient in every particular to sustain the decree.

The evidence shows that Frick was buying and selling every acre of timber land that he could get his hands upon in the vicinity of the property in question. In the deed he made to the California Door Company there was included ten other tracts, some

adjacent, and all within the same locality. Some of them had been acquired by the defendant immediately after final certificate had been issued to the entry man. The abstracts of title are lined with filings of mineral claims. Parkers' Mining Claims were of record in the office of the Recorder of El Dorado County and Frick's own testimony indicates, at least a claim on his part, that he was well acquainted with all the lands in the neighborhood. He testified that he personally examined the land; that it was unfit for cultivation, but was valuable chiefly for its timber; that it was uninhabited and unoccupied; that it contained no valuable deposits of gold, silver, cinnabar, copper or coal, and that there was no mining or other improvements thereon. These statements were made by him, under oath, at the time application was made at the Land Office, and if untrue, were a fraud on the Government.

Kingsbury, the Government Engineer, testified (Tr. 37) that he found minerals on the land; that there were mining improvements thereon; that there was a cabin on the place (Tr. 38) in good condition and mining work had been done for several years. He stated: "It was my opinion, from finding that gold there, that there was sufficient indication for a man to go ahead and develop the land with the expectation of making it pay." He further stated (Tr. 39) that it would be worth working and that it was valuable mineral land. He also stated he would be

willing to spend his own money in developing the property as mineral land; that he had made a study of mining formation of this particular country; that he had read some of the United States Geological reports on it and was familiar with the Plymouth Quadrangle. He stated he had read the said reports (Tr. 40) sufficiently to tell the Court that this country was and is mineral bearing. He stated to counsel for Frick that he had examined the Pyramid Peak Quadrangle and the folio and that he had it with him and he offered to show it to counsel for appellant. which offer was declined.

This witness had absolutely no interest in the suit at all and it is strange that counsel for appellant did not care to see the record he had been asking about in the hope of disqualifying the witness. The witness had the record with him; had read it and was willing to produce it in support of his testimony, with the result above indicated. Was it for the reason that the proof, without said record, was "clear, unequivocal and convincing?"

The witness Mauk (Tr. 41) knew the property; knew it was called the Parker Mine. He testified he had been there in 1902 and *"Mr. Parker and his wife were living there."* Parker was running a tunnel and brought out a pan or two of gold while the witness was there. Mauk further testified (Tr. 41) *"I know W. P. Frick. We were at that time in mining. Frick and I talked about Mr. Parker buying the*

mine of those parties, and the $1,000 *price that we were informed that he paid for it.*" (To digress, Frick in 1907 as a proof witness swore positively he was familiar with the lands in question; that they were timber lands and not mineral lands. The testimony of Mauk shows Frick knew they were mineral lands and were being worked as such by Parker as far back as 1902).

The witness further stated (Tr. 41) that Frick was familiar with the property; that Frick was there with the witness after Parker bought the mine and probably passed over the ground two or three times. The witness further stated there was a house (Tr. 41) on the property when Parker bought the mine, a small house or cabin. There were ditches to the mine. "*The vicinity in which the* (Tr. 41-42) *Parker mine is located was known as a mineral region.*" In speaking of his mining business with Frick he stated (Tr. 42) "We put in our plant 1,500 feet of pipe and worked one month and we cleaned up $1,800, with a *small* monitor." This mining was done about two miles from the Parker mine. Finally the witness testified concerning Parker: (Tr. 42) "We loaned or hired him our monitor and as much of our pipe as he wanted. *Mr. Frick was present when we loaded it on a wagon and hauled it over there. It was going to the Parker mine.*"

Ellen C. Parker, the wife of Parker, testified: (Tr. 42) "At one time I lived upon a mine that was

called the Parker mine; that was my husband's; he had it and I was up there with him. That is all the home we had—I gave up everything and went up there with him on the mine and he built the cabin himself in El Dorado County. I stayed there most of eight years and more." She stated they owned the mine after the earthquake in 1906 (Tr. 44); that Parker paid $1200 or $1300 for the mine; that they made their living off the mine for eight years; that they had a good many hired men; that ditches, etc., were constructed. In two days they took out over $340; that the cabin was a nice, good cabin with a cellar for provisions; that they dug a well and had a garden.

Meyer, a witness for the Government, testified (Tr. 46) that Parker was living at the mine and made his living from it; that there were two cabins on the ground; that the witness did mining adjoining the Parker claim and "the vicinity in which the Parker claim is located is known as mineral lands. *I knew W. P. Frick and part of his business at this time was buying and selling to the California Door Company timber lands.*"

The last witness for the Government, Megurre, testified (Tr. 47) that the California Door Company paid Frick $32.50 per acre for the land.

This was the Government's case and we submit that the proof was "clear, unequivocal and convincing." Not one witness called for the Government had any interest or motive for testifying. On the con-

trary, it is hard to find a witness for Frick who did not have some motive or interest in seeing Frick successful. Nearly every one of them went upon the land years afterwards at Frick's request and made an examination with the end in view of testifying for Frick. Remick, the first witness, did not know the value of the land when he was the first witness for the defense, but as the last witness for the defense he testified the land was worth about $10 per acre (Tr. 51 and 75). Remick's testimony shows he was a timber cruiser, not a mining man (Tr. 47); that he made his examination on May 5th or 6th, 1916. He admits (Tr. 48) that he saw some evidence of mining on the land; that he saw prospect holes on the land; that there was evidence of ground-sluicing having been done on the property. He stated (Tr. 49) that personally he would not take the land up as mineral land. (It must be remembered the witness was a timber cruiser). In answer to a question by the Court he stated (Tr. 49) *that he was preparing himself as a witness* when he went upon the land; that he went there to cruise the land as to its timber value; that those who sent him did not ask him to pan the gravel on the surface to find out whether there was any prospect there; that he made no particular examination (Tr. 50) to see if there were quartz outcroppings. He admitted (Tr. 51) that there was a ditch on the property and two cabins in a dilapidated condition. (This was in May, 1916, and we believe the

comments of the Court on this testimony as it was being adduced clearly indicate the lack of value it had as evidence in the case).

Frick took the stand in his own behalf, and as indicated before in this brief, it is purely of a negative character. It discloses that his memory is excellent for Frick but very treacherous and unreliable for the Government. He tells (Tr. 42) that he had been over the property a year or two before he was a proof witness for Robertson; that he had experience in mining in that locality and elsewhere; that he and Mauk were partners (Tr. 53) and their mining was a failure. (Mauk says they made $1,800 in one month with a small monitor within two miles of the Parker mine.) (Tr. 42). On cross-examination Frick stated that he did not know when he was a proof witness. (Tr. 54) that there were improvements on the property; that he did not know a shaft had been sunk and did not know that Parker was living there. He admitted that Mauk and he had evidently lent Parker a pipe and a monitor to work the Parker mine, but stated *it had passed out of his memory.* He admitted that Mauk and he had probably discussed what Parker had paid for the mine but that it likewise had passed out of his recollection and that it was "out of his recollection" in 1907 when he was a proof witness. He stated (Tr. 55): *"Robertson made his final proof I think October* 28, 1907, *and I bought the property about nine or ten days afterwards. The deed was*

recorded September 29th, 1909, nearly two years later." He stated (Tr. 56) that he surveyed the property in 1904 and that there were indications of what he termed "abandoned cuts."

We desire at this point to make some comment on Frick's testimony. We believe it shows conclusively that when he was Mauk's partner he had knowledge, first hand, that the Parker property was mineral land; that it was being operated successfully by Parker as mineral land and that when he desired to perpetrate a fraud on the Government, these matters very conveniently passed out of his recollection. Furthermore, his testimony shows that he surveyed the land as far back as 1904 and he either made a very superficial survey of the land or was blind because, outside of himself, *there was not a single witness called for the Government or for Frick who did not testify that there were mining and other improvements on the land.* Certainly a man of Frick's experience in taking up timber claims should, if he were acting in good faith, have been at least more cautious than he was before subscribing to the oath he took as a proof witness that this was not mineral land. Again, if he meant no fraud and desired to commit no fraud, why did he purchase the property from Robertson within a few days after Robertson obtained title and then did not record his deed for nearly two years afterwards? Why didn't he examine the records of El Dorado County to ascertain if

any claim whatever was on this land? Certainly the record in this case does not disclose that Frick is a fool or incompetent. On the contrary, it is fair to assume that he was a keen business man; an expert in getting public lands through entrymen, buying them at a small figure and selling them at a handsome profit. The end with Frick justified the means and fraud against the Government or an individual was of no concern to him so long as the business in which he was engaged brought a handsome profit to him. Robertson was a mere tool in his hands. Robertson was a fisherman in his leisure hours; Frick was always a cunning business man, seeking always to satisfy his own selfish ambition and his greed for gain. We believe as the Supreme Court of the United States has said in Booth Kelley Lumber Company vs. United States, 237 U. S. 481; 59 L. ed. 1058, quoting from the syllabus "the evidence offered in behalf of the defendants is outweighed by the inferences to be drawn from their conduct."

The other witnesses for the defense expressed some doubt as to the character of the land in question but all saw the evidences of mining on the property. Anthony testified (Tr. 59) the property was a mining claim in 1907; that there was one cabin with three rooms and a big fire place and Parker asked $10,000 for the claim. The witness further states that he would not call it an extra good purchase for timber but that there was some good timber on it. The wit-

ness Taylor stated (Tr. 61) there had been some mining done on the premises. On cross-examination he admitted that when he was on the land as proof witness (Tr. 63) he did not inspect the house to see if any one was living there; that there was a road leading to the house that any one could see and that his reason for stating as a proof witness that the property was unimproved was because "I *supposed* it was abandoned property." He admitted he knew that Parker's wife and son had lived on the premises for several years.

The testimony of the witnesses White and Seymour (Tr. 66, 67, 68, 69 and 70) throw little light on the situation here and we pass their testimony without comment.

The testimony of Norris English, the mining engineer called for the defendant (Tr. 70 to 78 inclusive) is replete with instances of his partisanship and his difficulties with the Court. Nevertheless this testimony shows that there were improvements on the property and indications of mining operations. He denies that a man and his wife could live on the property from the money made out of the mine notwithstanding the undisputed fact that Parker and his wife had done so for a number of years. He admitted at times that mining engineers are deceived on whether certain properties are good mining properties or not. (Tr. 74).

The foregoing is all the testimony in the case and we repeat that the only witness who materially attempted to controvert the complainant's evidence was the defendant Frick.

Before leaving the evidence, let us point out that counsel in their brief (page 30) refer to the fact that Mrs. Parker did not state in her testimony that the gold she testified about was obtained from *"any part of the property described in plaintiff's complaint."* This statement shows the weakness of appellant's position. He cannot find anything to substantiate his claim and he proceeds, through counsel, to grasp at straws like a drowning man. No one with a good cause would raise such a question. "He who seeks equity must do equity." "One must come into equity with clean hands," and it might be added their hands should remain clean after they get into equity. Furthermore, if Mrs. Parker were not testifying about the property in question, her whole testimony would be incompetent, irrelevant and immaterial and counsel would have seen that the same was objected to and stricken out. Failing to do so, they admit that her testimony referred to the identical land described in the bill.

In addition to this Mrs. Parker testified that she lived at the mine with her husband and the witness Mauk testified "Mr. Parker and his wife were living there," meaning at the mine, and there is no question about what mine he was speaking of (Tr. 41). We

submit, therefore, that the evidence of fraud is not only "clear, unequivocal and convincing," but that there is no evidence whatever to the contrary.

II.

THE FINDINGS OF THE LOWER COURT ON A QUESTION OF FACT ARE PRESUMPTIVELY RIGHT AND WILL NOT BE DISTURBED UNLESS THE APPELLATE COURT CAN CLEARLY SEE THAT THE DECREE IS OPPOSED TO THE WEIGHT OF THE EVIDENCE.

Lansing vs. Stanisics, 94 Fed. 380.
Metropolitan Bank vs. Rodgers, 53 Fed. 776.
Snider vs. Dobson, 74 Fed. 757.
McKinley vs. Williams, 74 Fed. 94.
Man vs. Kline Guaranty Savings Bank, 86 Fed. 51.
Kunsemiller vs. Hill, 86 Fed. 198.

In view of what has been said already we believe that there is nothing in this suit to show that the decree appealed from is opposed to the weight of the evidence. The decree in an equity suit is a solemn act and is not to be disturbed without an express and an explicit showing that it is opposed by the weight of the evidence. Let counsel for appellant show where the weight of the testimony is against this decree.

III.

DIFFERENT UNPREJUDICED MINDS MIGHT WITH EQUAL REASON DRAW DIFFERENT INFERENCES AND REACH DIFFERENT CONCLUSIONS BUT IF THE LOWER COURT HAS CONSIDERED CONFLICTING EVIDENCE AND MADE A FINDING THEREON, THE FINDING WILL BE PERMITTED TO STAND.

Metropolitan Bank vs. Rodgers, 53 Fed. 776.
Snider vs. Dobson, 74 Fed. 757.

The courts of equity of appellate jurisdiction will where the Court below on a full consideration of all the proofs comes to a conclusion on a question of fraud concur with the court below although the evidence raises some doubt.

See *Syllabus Parker vs. Phellplace,* 17 L. Ed. 675.

A decree cancelling a patent on the ground of fraud will not be disturbed on appeal where the evidence offered in behalf of the defendants is outweighed by the inferences to be drawn from their conduct. See *Booth-Kelley Lumber Co. vs. U. S.* cited *supra.*

Counsel lay stress on the proposition that where land was once mineral land it makes no difference

so long as, at the time of filng a timber claim, it was not mineral property.

We submit in 1907, when Robertson took steps to have issued to him a patent under the timber and stone act the evidence shows that this was mining property and the only testimony offered to prove the contrary was based on examinations made of the property in 1916, *nine years afterwards.*

IV.

THE COURT HAS A RIGHT TO GIVE A DECREE FOR DAMAGES IN THE AMOUNT SPECIFIED NOTWITHSTANDING THE FACT THE CASE WAS ON THE EQUITY SIDE OF THE COURT.

The evidence showed conclusively that the defendant before suit parted with title to an innocent purchaser and under the prayer for general relief the Court had the power to give a money judgment for the value of the property.

Tyler vs. Savage, 143 U. S. 79.
Lockhart vs. Leeds, 195 U. S. 427.
Southern Pacific vs. U. S., 200 U. S. 341.
Cooper vs. U. S., 200 Fed. 869.
Johnson vs. Carter, 120 N. W. 320.

Counsel cited the Act of March 2, 1896 (29 Stat. At L 42, 43) in support of the contention that in a case of this character the Government can only recover damages to the amount the Government would

receive upon issuing a patent. This Act applied alone to patents issued for railroad or wagon road grants and has no application here. We believe the opinion of the lower court disposes of this contention in the most effective way and we call the Court's attention to that particular part of said opinion which reads as follows:

> "The only question remaining is as to the measure of the damages to be awarded in relief. The defendant contends that this may not exceed the price at which the land was sold by the Government—$2.50 per acre—and in that regard relies upon the provisions of the Act of March 2nd, 1896 (29 Stat. at L. 42, 43), entitled: 'An Act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes'; but an examination of the provisions of that act will disclose that it has no application to a case of this character, but deals solely with the rights of bona fide purchasers in instances where the patent has issued erroneously. It does not affect cases proceeding like the present, on the theory of fraud in the procurement of the patent. In cases of the latter character, the principle has always been enforced that one guilty of fraud upon the Government is not to be permitted to benefit by his misdoing; that having deprived the Government of property to which it is entitled, the latter may justly claim the return of the entire value of that of which it has been deprived. That was, as will be seen, the measure of damages sustained by the Circuit Court of Appeals in *Cooper vs. United States, supra,* and is implicitly recognized as the proper measure in the other cases cited.
>
> Under this rule, it appearing that the defendant has sold the land in question, which he acquired in wrong of the Government's rights, for

> the price of $32.50 per acre, I am of opinion that that figure should be the measure of the Government's recovery. Let a decree be entered accordingly." (Tr. 34 and 35).

Other minor points are raised by appellant on pages 38 and 39 of his brief but we submit they are of no merit and in any event should have been raised in the lower court by motion to dismiss, motion to make more definite and certain or other like motion. In the absence of such motion, appellant cannot be heard to complain now.

CONCLUSION.

We submit, therefore, that the record shows a clear case of fraud on the part of the appellant Frick and an intentional fraud at that; that he went into the entire transaction with his eyes open and with the deliberate and preconceived design to defraud the Government and that he succeeded in so defrauding the Government and now comes into equity, not only to be relieved of his own fraud but also to take the position that he should be permitted to profit by his fraud because the Government price of the land was less than the price he realized on the sale of it. If equity favors such litigants then we have utterly failed to grasp the elementary principles of that branch of the law designed solely, as we understand it, to aid those who act in conscience and in justice and who invoke its aid with clean hands. Good faith alone is entitled to consideration from the chancellor

and we believe that in this suit it is manifest that appellant Frick at no time so acted with his Government.

For the foregoing reasons we respectfully submit the judgment of the District Court should be affirmed.

ANNETTE ABBOTT ADAMS,
United States Attorney,
FRANK M. SILVA,
Asst. United States Attorney,
Solicitors for Appellee.

9

No. 3206

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. P. Frick, *Appellant*, vs. The United States of America, *Appellee*.	}

APPELLANT'S REPLY BRIEF.

Jordan & Brann,
Attorneys for Appellant.

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No. 3206

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APPELLANT'S REPLY BRIEF.

We believe that counsel for the appellee have entirely failed to grasp the point of our objection to the decree of the lower court and to answer the same.

The fraud charged in the complaint is that "the said Bolling C. Robertson had not sought to enter the "land" for the purpose of securing the timber thereon, *but for the minerals found therein*" (Tr. fol. 10) and that appellant Frick, one of Robertson's proof witnesses and a subsequent purchaser of the land, "knew and has always known that the said entry * * * was made in bad faith" (Tr. fol. 11).

The fraud, in fact if the land were chiefly valuable for its minerals, and it was purchased as tim-

ber land, would be the lesser timber land price of $2.50 per acre for which the land could be gotten from the government, as against its mineral land price of $5 per acre if it was entered as mineral lands.

Now then, what is mineral land? We take it to be land chiefly valuable for the minerals contained in it.

So too we understand timber land to be land chiefly valuable for the timber standing and growing thereon.

Likewise it is its mineral or its *timber character and value at the time of the entry* that determines whether it must be entered and purchased under the Federal law governing mineral entries or under the Timber and Stone Act controlling the purchase and entry of timber lands.

Then the question for this court to determine here is, was the land chiefly valuable for its timber or chiefly valuable for its minerals when it was proved up by Robertson with the aid of Frick as a proof witness on October 28, 1907, the date of the issuance of the receiver's receipt therefor (Tr. fol. 8).

Now in considering the character .of this land at the time it was entered it must not be forgotten, that one branch of the government—the United States Land Office—has already determined that the land is chiefly valuable for its timber and has issued, not only a certificate of purchase, to this

effect, but more than this has also issued a patent to Robertson for the land as timber land (Tr. fol. 9).

As we stated in our opening argument, the burden of showing this land was chiefly valuable for its minerals, when entered by Robertson, was on the government. And to sustain this burden it was incumbent on it to show this, not merely by a preponderance of evidence, but to demonstrate it by evidence that is "clear, unequivocal and convincing" (our opening brief, p. 7).

How did the government show that the land was chiefly valuable for its minerals on October 28, 1907, when the certificate of purchase was issued to Robertson? (Tr. fol. 8.)

The first evidence offered by the government to prove its case was the proof "taken before the Sacramento Land Office on the issuance of the final receipt to the entry man" (Tr. fol. 36, and see this proof among the original exhibits sent from the lower court and not printed in the transcript as per Praecipe for Transcript on Appeal, Tr. 87 and 88 sub'd. 13).

This was the proof on which the land office determined the land to be chiefly valuable for its timber and issued the certificate of purchase and later the patent. *And this evidence conclusively shows the land to be timber land.* The government having introduced it, on its own behalf, is bound by it.

When the government calls the entry man as a witness in its own behalf, it is bound by his testimony, unless such testimony is overcome by countervailing evidence.

U. S. v. Barber Lumber Co., 172 Fed. 960, bottom page 961, 962;

Choctaw & M. R. Co. v. Newton, 140 Fed. 225 at page 250;

U. S. v. Budd, 144 U. S. 154.

Thus far the government has produced the testimony of three witnesses all of whom have testified that the land is chiefly valuable for its timber.

Now, what of the evidence later introduced by it to show the land chiefly valuable for its minerals and to overcome this first testimony "by countervailing evidence".

The testimony of the three witnesses Mauk (Tr. 41), Meyer (Tr. 46) and Ellen Parker (Tr. 43), giving it its full weight, showed that at some uncertain time prior to October 28, 1907, some portions of this land had had mining operations conducted on them. But what portions and when the operations were carried on and what the area or extent of ground was used in these operations is not shown. *Not one of them testified that the land had any mineral value* in October, 1907. Mauk had not been on the land since 1902 or 1903 (Tr. fol. 41). Meyer could not tell the year he was there (Tr. fol. 46), but did say it was a good many years since he was over there (Tr. fol. 47). We have already com-

mented on Ellen Parker's testimony (opening brief, 14, 15 and 16). But *Mrs. Parker did say the land was good timber land* (Tr. fol. 45).

The government's case now stands three witnesses positively testifying that the land was chiefly valuable for its timber and one more government witness, Ellen Parker, saying it was good timber land, and three witnesses saying that mining had been done on certain indefinitely described parts of the property at indefinite times prior to October. 1907.

This is not the kind of "countervailing evidence" that can overcome the positive testimony of the entry man and his proof witnesses, or that clearly, unequivocally and convincingly shows the land chiefly valuable for its minerals.

The only other government witness that testified about the character of this land was Mr. Kingsbury, government mineral expert, who came to the conclusion *in 1910* from "just panning" and "finding a number of colors of gold in the pan" that the land in the trench on the southeast corner of lot 4 in his opinion "was sufficient indication for a man to go ahead and develop the land with the expectation of making it pay" (Tr. fol. 38). He did not remember whether he "examined the quartz or not" (Tr. fol. 28). "All this work was on lot 4, except the placer work, which started on the south end of lot 5 and ran north on to lot 4. It was something like 250 feet long by 100 feet wide. It was placer work *where they had washed out the gravel* * *

* *where mining work had been done.*" Nowhere does Kingsbury tell us of *any placer gold bearing gravel still in place* or the extent of any such deposit nor of its value. Neither does he tell us of any quartz lodes or veins or the value or extent of any of such lodes or veins if any there were.

As to the timber on the land he says, "yes there was some good timber on there—*it was a timbered country* (Tr. fol. 40 bottom page).

Now we ask this court if there is one bit of testimony here that shows this land at the time Robertson entered it in 1907, to be chiefly valuable for its minerals? If there was any mineral ground how much was there and how valuable was it? As to these facts there is entirely wanting that "clear, unequivocal and convincing testimony" which the law requires to set aside a patent.

Supporting the testimony of the entry man and his proof witnesses, that the land was not chiefly valuable for its minerals, is the testimony of Mr. Norris English (Tr. fol. 70) and Mr. Seymour Hill (Tr. fol. 67),—one a mining engineer of large experience, the other a practical miner all his life—both of whom testify for the defense that the land has no mineral value and plus that is the testimony of J. C. Anthony (Tr. fol. 58) who says he and his associates turned the land down as of no value for mining purposes.

Then too it must not be forgotten that the uncontradicted evidence of Mr. Remick supported by Mr.

Frick, likewise uncontradicted, shows there is 5,000,000 feet, or about 25,000 feet to the acre, in the 200 acres of land here in controversy (Tr. fol. 47 and 53), and that this timber consisted of pine, fir and cedar. Remick also said this land was worth in October and November, 1907, $10 per acre (Tr. fol. 78), and in May, 1911, the California Door Company paid Frick $32.50 per acre for it for its timber (Tr. fol. 47).

In the face of this evidence as to the amount of timber on the land and its value how can testimony that mining had been done at uncertain times before October, 1907, on some parts of the land, likewise uncertain as to extent and amount and to values taken out and how can an *entire absence of evidence at the time the land was entered in October, 1907,* as to it being chiefly valuable or valuable at all for mining, ~~over-chiefly valuable or valuable at all for mining,~~ overcome the positive testimony given before the land office and at the trial of this case, that the lands were chiefly valuable for their timber? We most earnestly contend that it does not and can not.

Now the government, on pages 15 and 19 of its brief says that a decree cancelling a patent will not be disturbed where the evidence offered in behalf of the defendants is outweighed by inferences to be drawn from their conduct.

We ask what inferences can be drawn from the conduct of either Robertson or Frick, tending to

show that they really intended to get this land for its minerals?

Robertson never mined on the property. Neither did Frick. Frick only sold it to the California Door Company for its timber after he bought it from Robertson. So there is nothing in the conduct of either Robertson or Fick from which any fraud can be inferred or from which any intent to secure this land as mineral land can be drawn.

We have already shown that Frick bought the land from Robertson after the certificate of purchase had issued. There is nothing wrong in this.

It is complained that Frick was buying timber in the vicinity of this land. What this has to do with the question of the mineral character of the land here in question we fail to see, though it is perfectly consistent with the inference that he thought this land was timber land.

The government lays great stress on the point that there was not a single witness called that did not testify there were mining or other improvements on the land.

Well, what good are abandoned mining improvements on land that is not mineral?

And furthermore, if the owner did not contest the entry, or try to set aside the patent, surely he did not think them of any worth.

Again improvements do not determine the character of the property. It is what is in or on the ground—timber or minerals.

Counsel state the unquestioned law that the findings of the lower court will not be disturbed unless the Appellate Court can clearly see that the decree is opposed to the weight of the evidence.

But what is the weight of the evidence here?

The testimony of the three witnesses, Robertson, Taylor and Frick, show that the land was timber land.

Mr. Remick's testimony shows that the land was timber land.

Mr. Kingsbury says it was good timber land in a timbered country.

Mrs. Parker says it was good timber land.

No witness testified that it was not good timber land.

No witness showed that it was more valuable for its minerals than for its timber at the time of entry or at any other time.

No witness showed that it was chiefly valuable for its minerals at any time.

No witness showed that it had any profitable mineral value at any time.

All the government's mineral witnesses testified to was that mining operations had been carried on in some parts of the property prior to Robertson's entry in October, 1907, but whether these operations were such as to yield profit or showed the land chiefly valuable for its minerals the evidence is entirely wanting and unsatisfactory.

Counsel in their excess of zeal, trusting to their imagination for their facts, and not to the record, make certain unwarranted charges of fraud, but we do not care to argue matters not in the record so we make no further comment on them.

We accordingly submit that the evidence fails to support the decree in this case and that the judgment should be reversed and the bill dismissed.

Dated, San Francisco,
January 22, 1919.

Jordan & Brann,
Attorneys for Appellant.

No. 3207

/0

United States

Circuit Court of Appeals

For the Ninth Circuit.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS, and VERNITA WATTS,
Appellants,

vs.

JERUSHA CRABB and JOHN CRABB,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

FILED
SEP 23 1918
F. D. MONCKTON,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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In the United States Circuit Court of Appeals for the Ninth Circuit.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS, and VERNITA WATTS,

Appellants,

vs.

JERUSHA CRABB and JOHN CRABB,

Appellees.

Names and Addresses of the Attorneys of Record.

WILL M. PETERSON and RALEY and RALEY, Pendleton, Oregon, for the Appellants.

ALFRED S. BENNETT, The Dalles, Oregon, and JAMES A. FEE, Pendleton, Oregon, for the Appellees.

In the District Court of the United States for the District of Oregon.

Case No. 7340—IN EQUITY.

JERUSHA CRAB and JOHN CRAB, Husband and Wife,

Plaintiffs,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS and VERNITA WATTS,

Defendants.

Citation on Appeal.

United States of America to Jerusha Crab and John Crab, Husband and Wife, and to Alfred S. Bennett and James A. Fee, Your Attorneys of Record, GREETING:

YOU ARE HEREBY NOTIFIED that a certain case in equity in the United States District Court in and for the District of Oregon, wherein Jerusha Crab and John Crab, husband and wife, are plaintiffs, and Homer I. Watts, Marvel Watts, Jennie Anderson Watts and Vernita Watts are defendants, an appeal has been allowed the defendants therein to the United States Circuit Court of Appeals for the Ninth Circuit, and you are hereby cited and admonished to be and appear in said Court thirty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Hon. CHARLES E. WOLVERTON, Judge of the United States District Court for the District of Oregon, this 31st day of May, 1918.

CHAS. E. WOLVERTON,
District Judge.

I hereby acknowledge receipt of a copy of the foregoing citation and due service of such citation is hereby accepted at Pendleton, Oregon, this —— day of June, 1918, and all other and further service thereof is hereby waived.

JAMES A. FEE,
One of Attys. for Plffs. [1*]

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*Page-number appearing at foot of page of original certified Transcript of Record.

[Endorsed]: No. 7340. In the District Court of the United States for the District of Oregon. Jerusha Crab et al., Complainants, vs. Homer I. Watts et al., Respondents. Citation. U. S. District Court, District of Oregon. Filed Jun. 7, 1918. G. H. Marsh, Clerk. [2]

In the District Court of the United States for the District of Oregon.

November Term, 1916.

BE IT REMEMBERED, that on the 18th day of December, 1916, there was duly filed in the District Court of the United States for the District of Oregon, a bill of complaint, in words and figures as follows, to wit: [3]

In the United States District Court, for the District of Oregon.

JERUSHA CRAB and JOHN CRAB, Husband and Wife,

Plaintiffs,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS, and VERNITA WATTS,

Defendants,

Complaint in Equity.

Now comes the plaintiffs in the above-entitled cause, and praying for relief, show to the Court:

The South half (S.½) Section 30, Township 5 North, Range 35 East, W. M., aforesaid. **[5]** which tracts, taken together covered and included all of the land and all of the property owned by the said Thomas Watts at the time of his death, except one 80 acres, which was of barely sufficient value to pay off the mortgage which existed upon said real property and to pay the necessary funeral expenses and the expenses of administering his estate, and that they did procure a deed purporting to be executed by the said Thomas Watts, giving to the said defendant Jennie Anderson Watts the said West half of the southeast quarter, and the southeast quarter of the southwest quarter of said Section 32, hereinbefore described, and to the defendant Vernita Watts the said South half of Section 30, hereinbefore described, and that immediately after his death they caused said deeds to be recorded upon the deed records of Umatilla County, Oregon. That said signatures to said deeds were not in the handwriting of said Thomas Watts, but purported to have been signed by making his mark.

VI.

Plaintiffs further allege that said deeds and each of them were wholly without any valuable or other consideration and that the same, if executed by him at all, were secured from the said Thomas Watts when he was not fully conscious and was mentally incapacitated from making such a conveyance and by fraud and deception and undue influence, and by taking advantage of his enfeebled mental and physical condition, but that the said deeds were secured

and obtained when the said Thomas Watts was sick in bed at the home of the defendant Homer I. Watts, and when the only other person present was a witness secured by said defendant, and that these plaintiffs have no knowledge nor means of knowledge as to the exact details as to how said deeds were obtained, or as to whether they were induced and secured by such undue influence and fraud, misrepresentations and conduct as hereinbefore set forth and were actually signed by the said Thomas Watts, or whether his name was forged thereto, but plaintiffs allege that said deeds were not the **[6]** conscious and intelligent act of said Thomas Watts if signed by him at all, and that he had no intention or purpose of disposing of the said property or conveying it as set forth therein, and that in equity and good conscience said deeds are fraudulent, void, and of no effect.

VII.

Plaintiff Jerusha Crab alleges that she is the owner in equity, by virtue of inheritance from her father of an undivided one-third interest in all of the real property hereinbefore described, to wit:

> The West half of the Southeast quarter, and the Southeast quarter of the Southwest quarter of Section 32, and the South half of Section 30, all in T. 5 N., R. 35 East, W. M.,

as tenant with the said Homer I. Watts and Marvel Watts, who are the owners of the other two-thirds, but that the said deed, as recorded, makes it appear upon the records of said county that she is not the owner of any interest therein, but that the same be-

longs entirely to the said Jennie Anderson Watts and Vernita Watts.

VIII.

That plaintiffs believe and allege that the said Homer I. Watts and Marvel Watts and the other defendants have some arrangement between themselves by which they are to be the real owners and to receive the benefits from such land, and that the deeds were procured in the form they were solely for the purpose of enabling the said Homer I. Watts to take the acknowledgment of the same without calling in a third and disinterested party.

IX.

That the one-third interest of the plaintiff Jerusha Crab in said property is of the value of more than $3,000, to wit, of the value of $15,000.

X.

That immediately after the death of the said Thomas Watts, and the recording of said deeds, as aforesaid, the said defendants went into [7] the sole possession of said property, ousting the plaintiff Jerusha Crab, and wrongfully claiming sole ownership thereover, and that they have ever since kept the sole possession of the same and continue to oust the plaintiff, and have, during that time, taken and received divers large sums of money as the rents and profits, but the exact amount and the arrangement among themselves as to the possession of the property are to these plaintiffs entirely unknown.

XI.

That plaintiffs have no speedy or adequate remedy at law. That said Vernita Watts is an infant under

the age of eighteen years.

WHEREFORE, plaintiffs pray this Court for a discovery, and that the defendants be required and compelled to answer on oath—

FIRST. As to whether said deeds were forgeries, or as to whether they were actually signed and executed by the said Thomas Watts, and as to whether they claim, at the time they were so signed, that he was conscious and in the intelligent exercise of his faculties.

SECOND. As to what is the arrangement among themselves under which they are operating and possessing said property.

THIRD. As to what sums they or any of them have received as the rents and profits of said property.

And plaintiffs further pray that said deeds be set aside and cancelled and held for naught, and that the defendants be required to surrender up the same to be cancelled, and that they and each of them be forever restrained and enjoined from setting up or claiming any estate, right, title, or interest thereunder, and that the plaintiff Jerusha Crab be decreed to be the owner of an undivided one-third interest in the property hereinbefore described and that she recover immediate possession **[8]** of her said undivided one-third interest therein, and that she have an accounting of the rents and profits so received by said defendants from said property, and that this Court proceed to partition and divide the said property between herself and the said Homer I. Watts and Marvel Watts,

in accordance with the principles of equity, and for such other relief as may seem to the Court just and equitable.

And the plaintiffs pray to the Court that a writ of subpoena issue out of and under the seal of this Honorable Court to be directed to the said plaintiffs commanding them and each of them, on a certain day and under a certain penalty in the said writ to be inserted, personally to be and appear before this Court and then and there full, true, and perfect Answer make under oath to all and singular the premises hereinbefore set forth and further to stand to perform and abide such further orders, direction, and decree herein as to the Court shall seem meet and agreeable to equity and good conscience.

JAMES A. FEE and
A. S. BENNETT,
Attorneys and Solicitors for Plaintiffs. [9]

State of Washington,
County of Whitman,—ss.

We, Jerusha Crab and John Crab, being each duly sworn and each speaking for himself, says: I am one of the plaintiffs above-named and that the foregoing complaint in equity is true as I verily believe.

JERUSHA CRABB.
JOHN CRABB.

Subscribed and sworn to before me this 12th day of December, 1916.

[Seal] HARRY TERHUNE,
Notary Public for the State of Washington, Residing at St. John.

U. S. District Court. Filed Dec. 18, 1916. G. H. Marsh, Clerk. District of Oregon. [10]

And afterwards, to wit, on the 18th day of December, 1916, there was issued out of said court a subpoena ad respondendum, in words and figures as follows, to wit: [11]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed subpoena ad respondendum on the therein named Homer I. Watts by handing to and leaving a true and correct copy thereof, together with the copy or the complaint with him personally at Athena in said District on the 19 day of December, A. D. 1916.

JOHN MONTAG,
U. S. Marshal.
By D. B. Fuller,
Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed subpoena ad respondendum on the therein named Marvel Watts, as father and natural guardian of Vernita Watts, a minor, by handing to and leaving a true and correct copy thereof, together with the copy of the complaint with Marvel Watts, as father and natural guardian of Vernita Watts, a

minor, personally, at Portland, in said District, on the 19 day of December, A. D. 1916.

JOHN MONTAG,
U. S. Marshal.
By D. B. Fuller,
Deputy. [12]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed subpoena ad respondendum on the therein named Jennie Anderson Watts by handing to and leaving a true and correct copy thereof, together with the copy of the complaint with her personally at Athena, in said District, on the 19 day of December, A. D. 1916.

JOHN MONTAG,
U. S. Marshal.
By D. B. Fuller,
Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed subpoena ad respondendum on the therein named Vernita Watts by handing to and leaving a true and correct copy thereof, together with the copy of the complaint with Vernita Watts personally, at

Athena, in said District, on the 19 day of December, A. D. 1916.

JOHN MONTAG,
U. S. Marshal.
By D. B. Fuller,
Deputy. [13]

RETURN ON SERVICE OF WRIT.

United States of America,
District of Oregon,—ss.

I hereby certify and return that I served the annexed subpoena ad respondendum on the therein named Marvel Watts by handing to and leaving a true and correct copy thereof with him (individually), personally, at Athena, in said District, on the 19 day of December, A. D. 1916.

JOHN MONTAG,
U. S. Marshal.
By D. B. Fuller,
Deputy. [14]

In the District Court of the United States, for the District of Oregon.

No. 7340.

JERUSHA CRAB and JOHN CRAB, Husband and Wife,

Complainants,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS, and VERNITA WATTS,

Defendants.

Subpoena Ad Respondendum.

The President of the United States of America, to Homer I. Watts, Marvel Watts, Jennie Anderson Watts, and Vernita Watts, GREETING:

You, and each of you, are hereby commanded that you be and appear in said District Court of the United States, for the District of Oregon, at the courtroom thereof, in the City of Portland, in said District, to answer the exigency of a Bill of Complaint exhibited and filed against you in our said Court, wherein Jerusha Crab and John Crab are complainants, and you are defendants, and further to do and receive what our said District Court shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the Marshal of said District, or your Deputy, to make due service of this our Writ of Subpoena and to make due return of the same with your proceedings thereon into this Court within twenty days from this date.

Hereof fail not.

Witness the Honorable CHARLES E. WOLVERTON and the Honorable ROBERT S. BEAN, Judges of said Court, and the Seal thereof affixed at Portland, in said District, this 18th day of December, 1916.

G. H. MARSH,
Clerk.
By F. L. Buck,
Deputy Clerk.

MEMORANDUM, PURSUANT TO EQUITY RULE No. 12 OF THE SUPREME COURT OF THE UNITED STATES.

The defendant is required to file his answer or other defense in the clerk's office on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken pro confesso.

Returned and filed December 22, 1916.

G. H. MARSH,
Clerk. [15]

And afterwards, to wit, on the 4th day of January, 1917, there was duly filed in said court, an answer of Homer I. Watts, in words and figures as follows, to wit: [16]

In the District Court of the United States for the District of Oregon.

JERUSHA CRAB and JOHN CRAB, Husband and Wife,

Plaintiffs,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS and VERNITA WATTS,

Defendants.

Answer of Homer I. Watts.

Comes now the defendant, Homer I. Watts, and answering plaintiffs' bill of complaint filed herein, for himself and for himself alone, denies, admits, avers and alleges as follows:

I.

This defendant ADMITS paragraph I of said bill of complaint, and the whole thereof.

II.

This answering defendant ADMITS paragraph II of said bill of complaint, and the whole thereof.

III.

And answering paragraph III of said bill of complaint, this answering defendant ADMITS that said Thomas Watts died intestate on the 20th day of April, 1914, but DENIES that at the date of his death he was the owner of the west half of the southeast quarter, or the southeast quarter of the southwest quarter of section 32, township 5 north, range 35 east of the Willamette Meridian, or was the owner of the south half of section 30, township 5 north, range 35 east of the Willamette Meridian, and AVERS the fact to be that at the date of the death of the said Thomas Watts on the 20th day of April, 1914, one of the defendants of this cause, to wit, Vernita E. Watts, was the owner of the south half of section 30, in township 5 north, of range 35 east, W. M., and another of these defendants, [17] to wit, Jennie Anderson Watts, was the owner of the West one-half of the southeast quarter, and the southeast quarter of the southwest quarter of section 32, in township 5 north, of range 35 east, subject only to a life interest existing in the said Thomas Watts at the time of his death, and AVERS the fact to be that upon the death of the said Thomas Watts the said Jennie Anderson Watts became the absolute owner in fee simple of the said last-described tract

of land, freed from the said life estate of the said Thomas Watts.

IV.

ADMITS that the estate of the said Thomas Watts has been fully administered upon in the County Court of the State of Oregon for Umatilla County, and said administration has been duly closed and the administrator discharged.

V.

And answering paragraph V of said bill of complaint, this answering defendant ADMITS that for a considerable time prior to the death of the said Thomas Watts he was old and feeble in body and was sick in body, but DENIES that the said Thomas Watts was at all feeble in mind or that he was at all mentally weak or was at all easily influenced, or was at all incapable of doing business, or was at all not of intelligent comprehension of his affairs, or was at all not of a conscious or intelligent making or disposition of his property among those entitled to his bounty, and AVERS and ALLEGES the fact to be that at all times prior to and up to two days prior to the date of the death of the said Thomas Watts he was strong and firm in mind and was mentally capable of doing business, and was fully possessed of an intelligent comprehension of his affairs, and was thoroughly competent to make a conscious and intelligent disposition of his property among those entitled to his bounty and otherwise; and DENIES that shortly before the death of the said [18] Thomas Watts, or at any time before or at all or while Thomas Watts was on his deathbed or suffer-

ing from his last sickness, or so incapacitated as stated in plaintiffs' bill of complaint, or at all or at any other time, this defendant or these defendants or either of them or any of them conspired together, or at all conspired in any manner to cheat or defraud the plaintiff, Jerusha Crab, or anyone else, out of her interest in her father's estate, or to secure a deed purporting to be a deed from said Thomas Watts to the said Jennie Anderson Watts for the west half of the southeast quarter or the southeast quarter of the southwest quarter of section 32, township 5 north, of range 35 east of the Willamette Meridian, or any part thereof, or to secure or procure a deed to the said Vernita Watts for the south half of section 30, township 5 north, range 35 east, W. M., or any part thereof, or at all, or that this defendant or the other defendants or either or any one of them in any manner either did conspire together or did at all influence or induce the said Thomas Watts to make said deeds or either thereof; ADMITS that the lands described included all of the lands of the said Thomas Watts, except 80 acres, and ADMITS that said 80 acres was barely sufficient in value to pay for the mortgage which existed and to pay the necessary funeral expenses and expenses of administering the estate, and this defendant DENIES that he did or that any of the defendants did in any manner procure a deed purporting to be executed by the said Thomas Watts, giving to the said Jennie Anderson Watts the said west half of the southeast quarter, or the southeast quarter of the southwest quarter of said section 32, or any part thereof,

or to the defendant Vernita Watts the south half of section 30, or either or any part thereof; ADMITS that this defendant, in the manner hereinafter alleged, did cause the said deeds to be recorded [19] upon the Deed Records of Umatilla County, Oregon, and ADMITS that the said Thomas Watts did not in his own handwriting write his name to said deeds or either of them, but said deeds were signed by mark, and this defendant AVERS and ALLEGES the fact to be that the said Thomas Watts, about one week prior to his death and without any solicitation, persuasion or influence of any kind or character from this defendant or from anyone else, so far as this defendant has any knowledge whatever, did request this defendant to write and prepare for his execution a deed to Jennie Anderson Watts for the west half of the southeast quarter, and the southeast quarter of the southwest quarter of section 32, township 5 north, range 35 east, W. M., and to write and prepare a deed to Vernita Watts for the S.½ of Sec. 30, and did request and direct this defendant in the deed so prepared to Jennie Anderson Watts to reserve therein to the grantor, Thomas Watts, a life interest in said real property, and in pursuance of the directions of the said Thomas Watts this defendant did prepare both of such deeds, and thereupon and on the 14th day of April, 1914, the said Thomas Watts then being fully possessed of his mental faculties and knowing well what he was doing, did request this defendant to sign the grantor's name to said deeds, and thereupon the said Thomas Watts did execute the said deeds by making

his mark and by touching the pen while this defendant did make a cross for his mark in the presence of this defendant and in the presence of G. M. Jonas, and thereafter and on the same day, to wit, on the 14th day of April, 1914, the said Thomas Watts being then also fully conscious of what he was doing and fully understanding and knew what he was doing, did deliver the said deeds and both of them to this defendant, with direct instructions and directions to either himself place the said deeds of record, or to cause them to be recorded, so that the grantees therein might receive the benefit thereof, and the [20] said Thomas Watts did then and there absolutely part with the possession of said deeds and each of them and this defendant did thereafter deliver the said deeds to Marvel Watts, one of the defendants in this case, and did advise the said Marvel Watts of the instructions given to have the said deeds recorded, and the said deeds and each of them were thereafter duly an regularly recorded under the instructions given by the said Thomas Watts, and such deeds and each of them were recorded on the 20th day of April, 1914.

VI.

And this answering defendant, answering paragraph VI of said bill of complaint, DENIES that said deeds, or either of them, were wholly or at all without valuable or other consideration, and AVERS the fact to be that the said Jennie Anderson Watts was and is the wife of one of the sons of the said Thomas Watts, and the said Vernita Watts was and is the granddaughter of the said Thomas Watts, and

that for more than five years prior to the date of his death the said Thomas Watts had lived with and made his home with the said Jennie Anderson Watts and said Vernita Watts and the said Marvel Watts, and during all of that time the said Jennie Anderson Watts and Vernita Watts had cared for and looked after the welfare and comfort of the said Thomas Watts; and DENIES that the said deeds, or either of them, were or was secured from the said Thomas Watts when he was not fully conscious or when he was mentally incapacitated from making such conveyances, and AVERS the fact to be that at the time the said deeds were executed, said Thomas Watts was fully conscious of what he was doing and was capable mentally of making such conveyances and each of them, and had full knowledge of just what he was doing and why he was so doing; and DENIES that the said deeds or either of them were procured through fraud or through deceit or through any [21] undue influence or by taking any advantage of either his feeble mental or physical condition, and DENIES that the said Thomas Watts was enfeebled mentally. ADMITS that said deeds were executed when the said Thomas Watts was in a feeble physical condition, but DENIES that they were executed while the said Thomas Watts was sick in bed; ADMITS that said deeds and each of them were executed at the home of this defendant, and ADMITS that only one other person was present, but DENIES that the said person was procured to be present as a witness by this defendant or by either or any of the defendants herein; DENIES that the

plaintiffs have no knowledge or means of knowledge as to the details as to how said deeds were obtained, and DENIES that the said plaintiffs have no knowledge as to whether the said deeds were induced or secured by undue influence or fraud, or by misrepresentation or by conduct as set forth in plaintiffs' complaint, or as to whether or not the said deeds were actually signed by the said Thomas Watts, or as to whether his name was forged thereto, and DENIES that said deeds or either of them were not the conscious or intelligent act of the said Thomas Watts, and DENIES that he had no intention or purpose of disposing of the said property or conveying it, as set forth in said deeds, and DENIES that either in equity or good conscience or at all or for any reason said deeds, or either of them, is either fraudulent or void or of no effect, and AVERS the fact to be that the execution of said deeds and each of them was the intelligent act of the said Thomas Watts and that they were executed and delivered under his express direction and while he had full consciousness and knowledge of just what he was doing, and AVERS the fact to be that each of said deeds is a valid bona fide and honest conveyance of said property.

VII.

This answering defendant answering paragraph VII, DENIES [22] that the plaintiff Jerusha Crab is the owner of in equity or otherwise or at all, either by virtue of inheritance from her father or otherwise, of an undivided one-third interest, or of any interest in or to all

or any of the west half of the southeast quarter, of the southeast quarter of the southwest quarter of section 32, or the south half of section 30, all in township 5 north, range 35 east, or of any part in or to or interest therein, either as a tenant with the said Homer I. Watts or Marvel Watts or with either or any of them or at all, and DENIES that either the said Homer I. Watts or the said Marvel Watts are the owners of the other two-thirds or of any interest in or to the said property whatever, or any part thereof; ADMITS that the said deed as recorded makes it appear upon the records that Jerusha Crab is not the owner of any interest therein, and this answering defendant AVERS the fact to be that the said deeds as recorded truly state the real and true ownership of said real property.

VIII.

Answering paragraph VIII this answering defendant DENIES that the said Homer I. Watts or the said Marvel Watts or the other defendants, or either or any of them, have any arrangement between themselves by which they are to be the real owners or to receive the benefit from such land, or that the said deeds or either of them was procured in the form they were solely or at all for the purpose of enabling the said Homer I. Watts to take the acknowledgment of the same without calling in a third or disinterested party, and DENIES that the said deeds, or either of them, were procured by this defendant at all or in any manner or for any purpose except as hereinbefore fully set forth.

IX.

DENIES that the one-third interest of the plaintiff [23] Jerusha Crab or any interest of the said Jerusha Crab in said property is of the value of more than $3,000 or is of any value whatever, and DENIES that the said Jerusha Crab has a one-third interest or any other interest in said property, or any part thereof.

X.

DENIES that immediately after the death of the said Thomas Watts or the recording of said deeds, the defendants went into the possession of said property or ousted the plaintiff, Jerusha Crab therefrom, or wrongfully claimed sole ownership thereover, or that they have ever since kept the sole possession of the same, except for the purposes and in the manner hereinafter in this paragraph alleged; ADMITS that these defendants have received some money as the rents and profits from the said lands, in the manner and for the purposes herein set forth, and in this connection this defendant alleges; that for a long period of time prior to the death of the said Thomas Watts, and while the said Thomas Watts was the owner of said lands, this defendant, Homer I. Watts, and the said defendant Marvel Watts were occupying the said lands, and the whole thereof, under lease from the said Thomas Watts, and in and by the terms of said lease this defendant, Homer I. Watts, and the defendant, Marvel Watts, did farm, till and cultivate the said lands, and did pay and deliver to the said Thomas Watts as rental therefor a full one-third of all grain grown upon any and all of said

lands each year, the said one-third to be delivered to the said Thomas Watts at the warehouse, in sacks furnished by this defendant, and the said Marvel Watts, and in addition thereto this defendant and the said Marvel Watts did, from their own resources, pay insurance upon all crops so raised and grown; and this defendant does further allege and aver that at the date of the death of the said Thomas Watts this defendant [24] and the defendant Marvel Watts were so in possession of said premises and the whole thereof, occupying the same under a lease thereof upon the terms hereinbefore set forth.

XI.

ADMITS that Vernita Watts is an infant under the age of eighteen years.

And this defendant, further answering under oath, and answering plaintiffs' demand for a discovery, says, that neither of said deeds was a forgery, and does say that both of said deeds were the free act of the said Thomas Watts, and does say that the name of Thomas Watts to said deeds was not written thereon by the said Thomas Watts, but that the name T. J. Watts to each of said deeds was written by this defendant, Homer I. Watts, in the presence of the said Thomas Watts and in strict accord with his directions and at his request, and at a time when he was possessed of his full mental faculties and knew just what he was doing, and why he was doing it, and that the said Thomas Watts knew and fully understood the contents of said deeds and each of them at the time he directed this defendant to sign his name thereto, and that the said Thomas Watts

was in the full possession and exercise of his mental faculties and was fully conscious of everything that was done respecting said deeds, and that the said Thomas Watts, at that time and in that condition, directed this defendant to make his cross for him, and did touch the pen while the cross was being made in the presence of this defendant and in the presence of G. M. Jonas, and did then and there, while in the exercise of full mental consciousness and his full mental faculties, acknowledge the said deed to be his free and voluntary act, and did thereafter deliver the said deeds to this defendant, and did instruct this defendant to record the same or to cause the same to be recorded and delivered to the parties entitled to receive the same. [25]

And further answering plaintiff's demand for discovery, this defendant says on oath, and avers and alleges, that this defendant and the defendant Marvel Watts are operating the said properties under a lease and under the same terms and conditions as they were being operated for many years prior to the death of the said Thomas Watts, except that the one-third of the crop grown upon the lands now standing in the name of Jennie Anderson Watts is delivered to her, and the one-third of the crop from the lands now standing in the name of Vernita Watts is delivered to her or her representatives, each year.

And further answering plaintiffs' demand for discovery, this defendant says upon oath, and avers and alleges, that of the lands standing in the name of Jessie Anderson Watts there has been but one crop harvested since the said death of Thomas Watts;

that during the year 1914 the tillable lands of said premises were in summer fallow and no crop was raised therefrom; that the said lands were seeded in the fall of 1914, and crop was taken therefrom during the year 1915, and that the said lands are in summer fallow during the year 1916; that the crop taken therefrom during the year 1915 consisted of 2,028 sacks of wheat, containing 4,201-20/60 bushels, and that the said entire crop was sold to the Preston-Shaffer Milling Company at Athena, Oregon, at 80 cents per bushel, and that the entire crop brought in cash $3,361.06; that of the above amount of money Jennie Anderson Watts received as rental $1,120.35, and this defendant received $1,120.35, and Marvel Watts received $1,120.35; that the said Jennie Anderson Watts received her rental of $1,120.35 free of all costs and charges of harvesting and delivery; that this defendant Homer I. Watts, and Marvel Watts received their share of said crops as tenants, but paid therefrom all necessary expenses of the producing of said crop; and that at the time of the death of said Thomas Watts, to [26] wit, during the year 1914, the lands now standing in the name of Vernita Watts were in crop and the said lands of the said Vernita Watts for the year 1914 produced 2,865 sacks of wheat, containing 5,766-40/60 bushels of wheat, and that said wheat was sold to the Preston-Shaffer Milling Company for 67 cents per bushel and there was paid therefor the sum of $3,863.65; that there was paid to Vernita Watts as rental for the use of the said lands for the year 1914 one-third of the amount received from the said crop, to wit, the

sum of $1,287.85, and the other two-thirds thereof was received in equal shares by this defendant, Homer I. Watts, and the other tenant, Marvel Watts; that the said rental was paid to the said Vernita Watts free from all charges and expenses of the production of said crops; that from the part received by this defendant and Marvel Watts they paid all the expenses of the production of said crop; and during the year 1915 the lands of the said Vernita Watts were still under lease to this defendant and to Marvel Watts as partners, and were sown to spring grain, and there was produced from the lands of the said Vernita Watts during the year 1915, 1,085 sacks of wheat containing 2,250-20/60 bushels, and the same was sold to the Preston-Shaffer Milling Company of Athena, Oregon, at 85 cents per bushel, and brought $1,912.50; that the full one-third thereof, to wit, $637.50, was received by the said Vernita Watts as rental, and the other two-thirds was received by this defendant and the said Marvel Watts in equal shares as tenants of said property, and that the said one-third so delivered to the said Vernita Watts as rental was paid to her free and clear of all charges of production of said crop, and the cost of production of said crop was paid by this defendant and by the said Marvel Watts, and the said lands of the said Vernita Watts are still under lease to this defendant and Marvel Watts as partners under the same terms, and the said lands are being summer [27] fallowed during the year 1916.

And this defendant having fully answered plaintiffs' bill of complaint, now prays judgment that the

said bill be dismissed and that this defendant have and recover of and from the plaintiffs his costs and disbursements of this suit.

HOMER I. WATTS,
WILL M. PETERSON and
RALEY and RALEY,

Attorneys and Solicitors for the Defendant, Homer I. Watts.

State of Oregon,
County of Umatilla,—ss.

Personally appeared before me, the undersigned, a notary public for the State of Oregon, the defendant, Homer I. Watts, in the above-entitled cause, who being duly sworn, says, that he is the defendant in the above cause, and that the matters and things contained in said answer are true.

HOMER I. WATTS.

Sworn and subscribed before me this 4th day of January, 1917.

[Seal] J. H. RALEY,
Notary Public for Oregon.

My com. expires Mar. 16, 1917.

Service by certified copy of the foregoing answer of Homer I. Watts is hereby accepted at Pendleton, Oregon, this —— day of Jan'y, 1917, and all other service thereof is hereby waived.

JAMES A. FEE,
One of Attys. for Complaint.

Filed January 4, 1917. G. H. Marsh, Clerk. By S. A. Newberry, Deputy. Rec'd at Portland, Oregon, January 5, 1917. G. H. Marsh, Clerk. By

F. L. Buck, Deputy, for the District of Oregon. [28]

And afterwards, to wit, on the 4th day of January, 1917, there was duly filed in said court an answer of Marvel Watts, in words and figures as follows, to wit: [29]

In the District Court of the United States for the District of Oregon.

JERUSHA CRAB and JOHN CRAB, Husband and Wife,

Plaintiffs,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS and VERNITA WATTS,

Defendants.

Answer of Marvel Watts.

Comes now the defendant, Marvel Watts, and answering plaintiffs' bill of complaint filed herein, for himself and for himself alone, DENIES, ADMITS, AVERS and ALLEGES as follows:

I.

This defendant ADMITS paragraph I of said bill of complaint, and the whole thereof.

II.

This answering defendant ADMITS paragraph II of said bill of complaint, and the whole thereof.

III.

And answering paragraph III of said bill of com-

plaint, this answering defendant ADMITS that said Thomas Watts died intestate on the 20th day of April, 1914, but DENIES that at the date of his death he was the owner of the west half of the southeast quarter, or the southeast quarter of the southwest quarter of section 32, township 5 north, range 35 east of the Willamette Meridian, or was the owner of the south half of section 30, township 5 north, range 35 east of the Willamette Meridian, and AVERS the fact to be that at the date of the death of the said Thomas Watts on the 20th day of April, 1914, one of the defendants in this cause, to wit, Vernita E. Watts, [30] was the owner of the south half of section 30, in township 5 north, of range 35 east, W. M., and another of these defendants, to wit, Jennie Anderson Watts, was the owner of the west one-half of the southeast quarter, and the southeast quarter of the southwest quarter of section 32, in township 5 north, of range 35 east, subject only to a life interest existing in the said Thomas Watts at the time of his death, and AVERS the fact to be that upon the death of the said Thomas Watts the said Jennie Anderson Watts became the absolute owner in fee simple of the said last described tract of land free from the said life estate of the said Thomas Watts.

IV.

ADMITS that the estate of the said Thomas Watts has been fully administered upon in the County Court of the State of Oregon for Umatilla County, and said administration has been duly closed and the administrator discharged.

V.

And answering paragraph V of said bill of complaint, this answering defendant ADMITS that for a considerable time prior to the death of the said Thomas Watts he was old and feeble in body and was sick in body, but DENIES that the said Thomas Watts was at all feeble in mind or that he was at all mentally weak or was at all easily influenced, or was at all incapable of doing business, or was at all not of intelligent comprehension of his affairs, or was at all not of a conscious or intelligent making or disposition of his property among those entitled to his bounty, and AVERS and ALLEGES the fact to be that at all times prior to and up to two days prior to the date of the death of the said Thomas Watts he was strong and firm in mind and was mentally capable of doing business, and was fully possessed of an intelligent comprehension of his affairs, and was thoroughly competent to make a conscious and intelligent disposition of [31] his property among those entitled to his bounty and otherwise; and DENIES that shortly before the death of the said Thomas Watts, or at any time before or at all or while Thomas Watts was on his death bed or suffering from his last sickness, or so incapacitated as stated in plaintiffs' bill of complaint, or at all or at any other time, this defendant conspired with either or any of the other defendants or any one else, or at all conspired in any manner to cheat or defraud the plaintiff, Jerusha Crab, or anyone else, out of her interest in her father's estate or to secure a deed purporting to be a deed from said Thomas Watts to

the said Jennie Anderson Watts for the west half of the southeast quarter or the southeast quarter of the southwest quarter of section 32, township 5 north, of range 35 east of the Willamette Meridian, or any part thereof, or to secure or procure a deed to the said Vernita Watts for the south half of section 30, township 5 north, range 35 east, W. M., or any part thereof, or at all, or that this defendant, with the other defendants or either or any one of them, in any manner either did conspire together or did at all influence or induce the said Thomas Watts to make said deeds or either thereof; ADMITS that the lands described included all of the lands of the said Thomas Watts, except 80 acres, and ADMITS that said 80 acres was barely sufficient in value to pay for the mortgage which existed and to pay the necessary funeral expenses and expenses of administering the estate, and this defendant DENIES that he did or that any of the defendants with his knowledge did in any manner procure a deed purporting to be executed by the said Thomas Watts, giving to the said Jennie Anderson Watts the said west half of the southeast quarter, or the southeast quarter of the southwest quarter of said section 32, or any part thereof, or to the defendant Vernita Watts the south half of section 30, or either or any part thereof; ADMITS that this defendant, in the manner hereinafter alleged, [32] did cause the said deeds to be recorded upon the Deed Records of Umatilla County, Oregon, and ADMITS that the said Thomas Watts did not in his own handwriting write his name to said deeds or either of them, but this defendant, answer-

ing for himself, is informed and believes and therefore alleges on information and belief, that the said deeds were signed by mark by the said Thomas Watts; that this answering defendant was not present at the time the said deeds or either of them was executed by the said Thomas Watts, and has no personal knowledge of what at that time transpired, except this answering defendant alleges that whatever was done by the said Thomas Watts in the matter of the execution of said deeds or either of them, was not done and was not procured to be done at the solicitation or with the knowledge or by any persuasion or influence of any kind or character from this defendant, nor from anyone else so far as this defendant has any knowledge whatever; and this answering defendant further alleges that if the said deeds were executed upon the 14th day of April, 1914, the date upon which they purport to have been executed, that at that time the said Thomas Watts was in full possession of all of his mental faculties and was capable of making an intelligent disposition of his property and was fully possessed of all of his mental faculties, and that the said Thomas Watts remained in possession of his mental faculties and had full knowledge of what he was doing until the afternoon of the 18th day of April, 1914, and at all times prior thereto; and this answering defendant, Marvel Watts, further alleges and avers that he did not know of the execution of said deeds or of either of them until the 15th day of April, 1914, when he was informed that the said deeds had been executed and was informed by the defendant, Homer I. Watts,

that the said deeds had been executed and were in the office of the said Homer I. Watts, [33] with instructions to have the same recorded; that thereafter this answering defendant received the said deeds from said Homer I. Watts, and caused the same to be recorded on the 20th day of April, 1914.

VI.

This answering defendant, answering Paragraph VI of said bill of complaint, DENIES that said deeds or either of them were wholly or at all without valuable or other consideration, and avers the fact to be that the said Jennie Anderson Watts was and is the wife of the defendant, Marvel Watts, and the daughter-in-law of the said Thomas Watts, and that said Vernita Watts was and is the granddaughter of the said Thomas Watts, and that for more than five years prior to the date of his death the said Thomas Watts had lived with and made his home with the said Jennie Anderson Watts and said Vernita Watts and the said Marvel Watts, and during all that time the said Jennie Anderson Watts and Vernita Watts had cared for and looked after the welfare and comfort of the said Thomas Watts; and this answering defendant further says that, while he has no personal knowledge of the immediate conditions under which the said deeds were executed, that he is informed and believes, and therefore alleges upon information and belief that at the time the said deeds were executed said Thomas Watts was fully conscious of what he was doing and was capable mentally of making such conveyances and each of them, and had full knowledge of just what he

was doing and why he was so doing, and alleged upon information and belief the fact to be that the execution of the said deeds, and each of them, was the intelligent act of the said Thomas Watts and that they and each of them were executed and delivered under his express directions and while he had full consciousness and knowledge of just what he was doing; and that each of said deeds is a valid, bona fide and honest conveyance [34] of said property, and DENIES upon information and belief that either of said deeds was induced or secured by fraud or undue influence.

VII.

This answering defendant, answering paragraph VII, DENIES that the plaintiff, Jerusha Crab, is the owner in equity or otherwise or at all, either by virtue of inheritance from her father or otherwise, of an undivided one-third interest or of any interest in or to all or any of the lands described in plaintiff's complaint, or any part thereof, or in or to any interest therein, either as a tenant with the said Homer I. Watts or Marvel Watts, or with either or any of them or at all, and DENIES that either the said Homer I. Watts or the said Marvel Watts are the owner of the other two-thirds or of any interest in or to the said property whatever, or any part thereof, and ADMITS that the said deeds as recorded make it appear upon the records that Jerusha Crab is not the owner of any interest therein, and this answering defendant AVERS the fact to be that the said deeds as recorded truly state the real and true ownership of said property.

VIII.

And this defendant, Marvel Watts, DENIES that the said Homer I. Watts and this defendant, or either of them, have any arrangement between themselves by which they or either of them is to be the real owner of said property or any part thereof, or to receive the benefit from such lands except as tenants under lease, as hereinafter alleged; and DENIES that the said deeds or either of them was procured in the form they were solely or at all for the purpose of enabling the said Homer I. Watts to take the acknowledgment of the same without calling in a third or disinterested party; and DENIES that the said deeds or either of them was procured by this defendant at all or in any manner or for any purpose. [35]

IX.

DENIES that the one-third interest of the plaintiff Jerusha Crab, or any interest of said Jerusha Crab in said property is of the value of more than $3,000.00, or is of any value whatever, and DENIES that the said Jerusha Crab has a one-third interest or any other interest in said property or any part thereof.

X.

DENIES that immediately after the death of said Thomas Watts or the recording of said deeds this defendant, or either of the defendants, went into the possession of said property or ousted the plaintiff, Jerusha Crabb therefrom, or wrongfully claim sole ownership thereof, or that they have ever since or at all kept the sole possession of the same, except for

the purposes and in the manner hereinafter alleged. ADMITS that this defendant has received some money and has the rents and profits from the said lands in the manner and for the purposes herein set forth, and in this connection this defendant alleges that for a long period of time prior to the death of the said Thomas Watts and while the said Thomas Watts was the owner of said lands, this defendant Marvel Watts, and the defendant, Homer I. Watts, were partners occupying the said lands and the whole thereof under lease, and as tenants of and from the said Thomas Watts, and in and by the terms of the said lease this defendant, Marvel Watts, and the defendant, Homer I. Watts, did farm, till and cultivate the said lands and did pay and deliver to the said Thomas Watts as rental therefor a full one-third of all grain grown upon any and all of said lands each year, the said one-third to be delivered to the said Thomas Watts at the warehouse in sacks furnished by this defendant, and the said Homer I. Watts, and in addition thereto this defendant and the Homer I. Watts did from their own resources pay insurance upon all crops so raised and grown; and this defendant further alleges [36] and avers that at the date of the death of the said Thomas Watts this defendant and the said Homer I. Watts were so in possession of said premises and the whole thereof, occupying the same under lease thereof upon the premises hereinbefore set forth.

XI.

This defendant ADMITS that Vernita Watts is

an infant under the age of eighteen years.

And this defendant further answering under oath, and answering plaintiffs' demand for a discovery, says:

That to the utmost and best of all of his knowledge, information and belief, neither of said deeds was a forgery, and says upon information and belief that neither of said deeds was a forgery, and therefore alleges and does say that to the utmost of his knowledge, information and belief both of said deeds were the free act of the said Thomas Watts, and therefore does aver and allege, upon information and belief, that both of said deeds were the free act of the said Thomas Watts, and to the utmost of his knowledge, information and belief does say that the name of Thomas Watts to said deeds was not written thereon by the said Thomas Watts, but that the name T. J. Watts to each of said deeds was written by the defendant, Homer I. Watts, in the presence of the said Thomas Watts and in strict accord with his direction and at his request, and at a time when he was possessed of his full mental faculties and knew just what he was doing, and why he was doing it, and that the said Thomas Watts knew and fully understood the contents of said deeds and each of them at the time they were signed, and that the said Thomas Watts was in full possession and exercise of his mental faculties and was fully conscious of everything that was done respecting said deeds, and that the said Thomas Watts at that time and in that condition directed the defendant, Homer [37] I. Watts to make his cross for him, and did touch the

pen while the cross was being made, in the presence of the defendant Homer I. Watts, and in the presence of G. M. Jonas, and did then and there, while in the exercise of full mental consciousness and while possessed of his full mental faculties, acknowledge the said deeds to be his free and voluntary act, and did thereafter deliver the said deeds to the said Homer I. Watts, and did instruct the said Homer I. Watts to record the same or to cause the same to be recorded and to be delivered to the parties entitled to receive them, and therefore this answering defendant alleges this statement of facts to be true upon information and belief.

And further answering plaintiffs' demand for discovery, this defendant says on oath, and avers and alleges, that this defendant and the defendant Homer I. Watts are operating the said properties under a lease and under the same terms and conditions as they were being operated for many years prior to the death of the said Thomas Watts, except that one-third of the crop grown upon the lands now standing in the name of Jennie Anderson Watts is delivered to her, and the one-third of the crop from the lands now standing in the name of Vernita Watts is delivered to her or her representatives, each year.

And further answering plaintiffs' demand for discovery, this defendant says upon oath, and avers and alleges the fact to be, that of the lands standing in the name of Jennie Anderson Watts there has been but one crop harvested since the death of Thomas Watts; that during the year 1914 the till-

able land on said premises was in summer fallow and no crop was raised therefrom, that the said lands were seeded in the fall of 1914 and crop was taken therefrom during the year 1915, and that said lands were in summer fallow during the year 1916; that the crop taken therefrom during the year 1915 consisted of 2028 sacks of wheat [38] containing 4201–20/60 bushels, and the said entire crop was sold to the Preston-Shaffer Milling Company at Athena, Oregon, at 80 cents per bushel, and that the entire crop brought in cash $3,861.06; that of the above amount of money, Jennie Anderson Watts received as rental $1,120.35, and this defendant received $1,120.35, and Homer I. Watts received $1,120.35; that the said Jennie Anderson Watts receives her rental of $1,120.35 free of all costs and charges of harvesting and delivery, and this defendant and Homer I. Watts received their share of the said crops as tenants, but paid therefrom all necessary expenses of the production of said crops; and that at the time of the death of the said Thomas Watts, to wit, during the year 1914, the lands now standing in the name of the said Vernita Watts was in crop and the said lands of the said Vernita Watts for the year 1914 produced 2,865 sacks of wheat, containing 5,766–40/60 bushels of wheat, and the said wheat was sold to the Preston-Shaffer Milling Company for 67 cents per bushel and there was paid therefor the sum of $3,863.65; that there was paid to Vernita Watts as rental for the use of the said lands for the year 1914 one-third of the amount received from the said crop, to wit, the sum of

$1,287.85, and the other two-thirds thereof was received in equal shares by this defendant and the said Homer I. Watts, as tenants; that the said rental was paid to the said Vernita Watts free from all charges and expenses of the production of said crops; that from the part received by this defendant and Homer I. Watts they paid all the expenses of the production of said crop; that during the year 1915 the lands of the said Vernita Watts were still under lease to this defendant and to Homer I. Watts as partners, and was sown to spring grain, and there was produced from the lands of the said Vernita Watts in the year 1915, 1085 sacks containing 2250-2/60 bushels, and the same was sold to the Preston-Shaffer Milling Company at 85 [39] cents per bushel and brought $1,912.50; that the full one-third thereof, to wit, $637.50, was received by the said Vernita Watts as rental and the other two-thirds was received by this defendant and the said Homer I. Watts in equal shares, as tenants of said property, and that the said one-third so delivered to the said Vernita Watts as rental was paid to her free and clear of all charges of production of said crop, and the cost of production of said crop was paid by this defendant and by the said Homer I. Watts, and the said lands of the said Vernita Watts are still under lease to this defendant and to Homer I. Watts as partners, under the same terms, and the said lands are being summer fallowed during the year 1916.

And this defendant having fully answered plaintiffs' bill of complaint, now prays judgment that the

said bill be dismissed and that this defendant have and recover of and from the plaintiffs his costs and disbursements of this suit.

WILL M. PETERSON and
RALEY and RALEY,

Attorneys and Solicitors for the Defendant, Marvel Watts.

State of Oregon,
County of Umatilla,—ss.

On this 4th day of January, 1917, at Pendleton, in Umatilla County and State aforesaid, before me personally appeared Marvel Watts, who being first duly sworn, deposes and says on oath, that he is one of the defendants named in the foregoing answer; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to such matters therein as are stated on information and belief, and *and* as to those matters, he believes them to be true.

MARVEL WATTS.

Sworn to and subscribed before me this 4th day of January, 1917.

[Seal] J. H. RALEY,
Notary Public for Oregon.

My com. expires Mar. 16, 1917. [40]

Service by receipt of certified copy of the foregoing answer is hereby accepted and all further or other service thereof is hereby waived this —— day of January, 1917.

JAMES A. FEE,
One of Attys. for *Complaint.*

Filed Jany. 4, 1917. G. H. Marsh, Clerk U. S. District Court for the District of Oregon. By S. A. Newberry, Deputy.

Received at Portland, Oregon, January 5, 1917.

G. H. MARSH,
Clerk.
F. L. Buck,
Deputy. [41]

And afterwards, to wit, on the 4th day of January, 1917, there was duly filed in said court an answer of Jennie Anderson Watts, in words and figures as follows, to wit: [42]

In the District Court of the United States, for the District of Oregon.

JERUSHA CRAB and JOHN CRAB, Husband and Wife,

Plaintiffs,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS and VERNITA WATTS,

Defendants.

Answer of Jennie Anderson Watts.

Comes now the defendant, Jennie Anderson Watts, and answering plaintiffs' bill of complaint filed herein, for herself and for herself alone, DENIES, ADMITS, AVERS and ALLEGES as follows:

I.

This defendant ADMITS paragraph I of said bill of complaint, and the whole thereof.

II.

This answering defendant ADMITS paragraph II of said bill of complaint, and the whole thereof.

III.

And answering paragraph III of said bill of complaint, this answering defendant ADMITS that said Thomas Watts died intestate on the 20th day of April, 1914, but DENIES that at the date of his death he was the owner of the west half of the southeast quarter, or the southeast quarter of the southwest quarter of section 32, township 5 north, range 35 east of the Willamette Meridian, or was the owner of the south half of section 30, township 5 north, range 35 east of the Willamette Meridian, and AVERS the fact to be that at the date of the death of the said Thomas Watts on the 20th day of April, 1914, one of the defendants in this cause, to wit, Vernita E. Watts, [43] was the owner of the south half of section 30, in township 5 north, of range 35 east, W. M., and another of these defendants, to wit, Jennie Anderson Watts, was the owner of the west one-half of the southeast quarter, and the southeast quarter of the southwest quarter of section 32, in township 5 north, of range 35 east, subject only to a life interest existing in the said Thomas Watts at the time of his death, and AVERS the fact to be that upon the death of the said Thomas Watts the said Jennie Anderson Watts became the absolute owner in fee simple of the said last-described tract

of land, freed from the said life estate of the said Thomas Watts.

IV.

ADMITS that the estate of the said Thomas Watts has been fully administered upon in the county court of the State of Oregon for Umatilla County, and said administration has been duly closed and the administrator discharged.

V.

And answering paragraph V of said bill of complaint, this answering defendant ADMITS that for a considerable time prior to the death of the said Thomas Watts he was old and feeble in body and was sick in body, but DENIES that the said Thomas Watts was at all feeble in mind or that he was at all mentally weak or was at all easily influenced, or was at all incapable of doing business, or was at all not of intelligent comprehension of his affairs, or was at all not of a conscious or intelligent making or disposition of his property among those entitled to his bounty, and AVERS and ALLEGES the fact to be that at all times prior to and up to two days prior to the date of the death of the said Thomas Watts he was strong and firm in mind and was mentally capable of doing business, and was fully possessed of an intelligent comprehension of his affairs, and was thoroughly competent to make a conscious and intelligent [44] disposition of his property among those entitled to his bounty, and otherwise; and DENIES that shortly before the death of the said Thomas Watts, or at any time before or at all or while Thomas Watts was on his death bed or suf-

fering from his last sickness, or so incapacitated as stated in plaintiff's bill of complaint, or at all or at any other time, this defendant conspired with either or any of the other defendants or anyone else, or at all conspired in any manner to cheat or defraud the plaintiff, Jerusha Crab, or anyone else, out of her interest in her father's estate or to secure a deed purporting to be a deed from said Thomas Watts to the said Jennie Anderson Watts for the west half of the southeast quarter of the southwest quarter of section 32, township 5 north, of range 35 east of the Willamette Meridian, or any part thereof, or to secure or procure a deed to the said Vernita Watts for the south half of section 30, township 5 north, range 35 east, W. M., or any part thereof, or at all, or that this defendant, with the other defendants or either or any one of them, in any manner either did conspire together or did at all influence or induce the said Thomas Watts to make said deeds or either thereof; ADMITS that the lands described included all of the lands of the said Thomas Watts, except 80 acres, and ADMITS that said 80 acres was barely sufficient in value to pay for the mortgage which existed and to pay the necessary funeral expenses and expenses of administering the estate, and this defendant DENIES that he did or that any of the defendants with her knowledge did in any manner procure a deed purporting to be executed by the said Thomas Watts, giving to the said Jennie Anderson Watts the said west half of the southeast quarter, or the southeast quarter of the southwest quarter of said section 32, or any part thereof, or to

the defendant Vernita Watts the south half of section 30, or either or any part thereof; ADMITS that this defendant, [45] in that she caused said deeds to be recorded in the Deed Records of Umatilla County, Oregon, and ADMITS that said signatures to said deeds were not in the handwriting of said Thomas Watts, but purported to have been signed by making his mark, and this answering defendant alleges that she was not present at the time said deeds were signed or executed, but is informed and believes and therefore alleges upon information and belief that the said deeds were signed by the said Thomas Watts by making his mark.

VI.

DENIES that said deeds or either of them was wholly or at all without any valuable or other consideration, and avers and alleges the fact to be that this defendant was and is a daughter-in-law of the deceased, and the defendant Vernita Watts was and is a granddaughter of the deceased, Thomas Watts, and that for more than five years prior to the date of the death of the said Thomas Watts he had lived with and made his home with this defendant, and said Vernita Watts and the defendant Marvel Watts, and during all of said time this defendant and the defendant Vernita Watts had cared for and looked after the welfare and comfort of the said Thomas Watts, and this defendant avers the fact to be that said deeds, and each of them, were executed and delivered for a good and valuable consideration, and this defendant further says that she has no personal knowledge of the immediate conditions under

which the said deeds were executed, and therefore DENIES upon information and belief that the said deeds or either of them were at all secured from the said Thomas Watts when he was not fully conscious or was mentally incapacitated from making such conveyances, or that they were, or either of them was obtained from him either by or through fraud or deceit or undue influence, or by taking advantage of his mental or physical condition, or that said deeds were **[46]** secured or obtained when the said Thomas Watts was sick at the home of the defendant Homer I. Watts, or when the only other person present was a witness secured by said defendant, Homer I. Watts, and DENIES on information and belief that said deeds or either of them were not the conscious or intelligent act of the said Thomas Watts, or that he had no intention or purpose of disposing of the said property or conveying it as set forth in said deeds, and DENIES that in equity or good conscience or at all or for any reason said deeds or either of them was fraudulent or void or of no effect, and this answering defendant AVERS the fact to be that she is informed and believes that the said deeds and each of them were duly and regularly executed and delivered by the said Thomas Watts at a time when he was mentally capable in every way of making, executing and delivering said deeds and that the said deeds and each of them are the conscious and intelligent act of the said Watts, and that the said deeds, and each of them, are valid and in full force and effect, and therefore this defendant alleges upon information and belief that the said

deeds, and each of them were so executed by the said Thomas Watts, and are valid and subsisting conveyances of the said lands.

VII.

DENIES that the said Jerusha Crab is the owner in equity or otherwise or at all, by virtue of inheritance from her father or otherwise, of an equitable one-third interest or of any interest at all in all or any of the real property described in said complaint, and DENIES that she is a tenant with the said Homer I. Watts or Marvel Watts or either of them, and DENIES that the said Homer I. Watts or the said Marvel Watts or either of them are the owners of the other two-thirds of said lands, or of any interest whatever in or [47] to said lands, and avers and alleges the fact to be that this defendant is the sole and only owner of the west half of the southeast quarter, and the southeast quarter of the southwest quarter of section 32, and that Vernita Watts is the sole and only owner of the south half of section 30, all in township 5 north, of range 35, east, W. M. ADMITS that said deeds as recorded make it appear upon the record of said county that the said Jerusha Crab is not the owner of any interest therein, but this defendant avers and alleges the fact to be that the said deeds so recorded correctly represent and describe the true owners thereof.

VIII.

DENIES that the said Homer I. Watts or the said Marvel Watts or any of the other defendants have any arrangements between themselves, whereby either the said Homer I. Watts or the said Marvel

Watts are to be the real owners or any owners of said lands, or any interest therein, or to receive the benefits from said lands, except as tenants under the terms and conditions hereinafter set forth, and DENIES any knowledge or information sufficient to form a belief as to whether or not the deeds were procured in the form they were solely or at all for the purpose of enabling said Homer I. Watts to take the acknowledgment of said deeds without calling in a third or disinterested party, and therefore this defendant DENIES said allegations upon information and belief.

IX.

DENIES that the one-third interest of the said plaintiff, Jerusha Crab, in said property is of the value of more than $3,000, or is of any value whatever, and DENIES that the said Jerusha Crab has any one-third or other interest in said property or any part thereof.

X.

ADMITS that after the death of the said Thomas Watts and [48] the recording of said deeds this defendant did take possession of the west half of the southeast quarter and the southeast quarter of the southwest quarter of section 32, and that the defendant Vernita Watts did go into possession of the south half of section 30, all in township 5 north, of range 35 east of the Williamette Meridian, but DENIES that they or either of them ousted the plaintiff, Jerusha Crab of the possession thereof, or that either this defendant or the said Vernita Watts is wrongfully claiming the sole ownership thereof.

ADMITS that they have ever since kept the sole possession of the same, except respecting the leases hereinafter mentioned, and ADMITS that these defendants have taken and received sums of money as rents and profits from said lands, in the manner and to the extent hereinafter set forth.

XI.

ADMITS that the said Vernita Watts is an infant under the age of eighteen years.

And further answering under oath, and answering plaintiffs' demand for a discovery, this defendant says on oath and alleges, that to the utmost and best and all of her knowledge, information and belief, neither of said deeds was a forgery, and therefore alleges upon information and belief that neither of said deeds was a forgery, and does further say that to the utmost of her knowledge, information and belief, both of said deeds were the free act of the said Thomas Watts, and therefore she does aver and allege upon information and belief that both of said deeds were the free act of the said Thomas Watts, and to the utmost of her knowledge, information and belief, does say that the name of the said Thomas Watts to said deeds was not written thereon by the said Thomas Watts, but that the name T. J. Watts to each of said deeds was written by the defendant, Homer I. Watts, in the presence of the said Thomas Watts and in strict accord with his directions and at his request, **[49]** and at a time when he was possessed of his full mental faculties and knew just what he was doing and why he was doing it, and that the said Thomas Watts knew and fully understood

the contents of said deeds and each of them at the time they were signed, and that the said Thomas Watts was in full possession and exercise of his mental faculties and was fully conscious of everything that was done respecting said deeds, and that the said Thomas Watts was at that time and in that condition directed the defendant, Homer I. Watts, to make his cross for him and did touch the pen while the cross was being made, in the presence of the defendant Homer I. Watts, and in the presence of G. M. Jonas, who did then and there, while in the exercise of full mental consciousness, and while possessed of his full mental faculties, acknowledge the said deeds to be his free and voluntary act and deed, and thereafter delivered the said deeds to the said Homer I. Watts and did instruct the said Homer I. Watts to record the same or to cause the same to be recorded and to be delivered to the parties entitled to receive them, and therefore, this answering defendant being without personal knowledge thereof, alleges this statement of facts to be true upon information and belief.

And further answering the plaintiffs' demand for discovery, this defendant says on oath and avers and alleges that the defendants Homer I. Watts and Marvel Watts, are operating the lands of this defendant as partners under a lease from this defendant to them, and that they are operating the lands of the said Vernita Watts as partners under a lease to them, and that by virtue of the agreement of lease and rental existing between this defendant and the said Homer I. Watts and Marvel Watts as partners,

and existing between the said Vernita Watts and Homer I. Watts and Marvel Watts as partners, the said Homer I. Watts [50] and Marvel Watts as partners pay rental for the use of said lands one-third of the crops produced from said lands, delivered at the warehouse on the railroad in sacks; said sacks are furnished by the said partnership, and in addition thereto the said partnership pays all insurance upon the crops so raised.

And further answering plaintiffs' demand for discovery this defendant says upon oath and avers and alleges the fact to be that of the lands standing in the name of this defendant, there has been but one crop harvested since the death of the said Thomas Watts; that during the year 1914 the tillable land on said premises was in summer-fallow and no crop was raised therefrom, that during the year 1916 the said land was in summer-fallow and no crop was raised thereon; that a crop of wheat was raised upon the said premises during the year 1915, and that the said crop so raised during said year consisted of 2,028 sacks of wheat, containing 4,201–20/60 bushels, and that the said crop was sold to the Preston-Shaffer Milling Company at Athena, Oregon, at 80 cents per bushel, and this defendant received as rental for the use of said lands the one-third thereof, to wit, the sum of $1,120.35, and no more; and that of the lands belonging to Vernita Watts, crops were raised thereon during the years 1914 and 1915, but no crop was raised thereon during the year 1916, the said lands being in summer-fallow; that there was raised on said lands as the crop of 1914, 2,865 sacks of

wheat, containing 5,766–40/60 bushels, and that said wheat was sold to the Preston-Shaffer Milling Company for 67 cents per bushel, and the said Vernita Watts received as rental for the use of said lands during the year 1914 the sum of $1,287.85, and that there was raised upon said lands so belonging to the said Vernita Watts during the year 1915, 1,085 sacks, containing 2,250–2/60 bushels, and the said [51] wheat was sold to the Preston-Shaffer Milling Company for 85 cents per bushel, and the said Vernita Watts received one-third thereof, to wit, $637.50, and no more; and this answering defendant says that both the lands of this defendant and of the said Vernita Watts have been under lease to the said Homer I. Watts and Marvel Watts as partners ever since and for a long time prior to the death of the said Thomas Watts, and that the lands are now so under lease from this defendant and the said defendant, Vernita Watts, to the said partnership of Homer I. Watts and Marvel Watts.

And this defendant having fully answered plaintiffs' bill of complaint, now prays judgment and decree that the said bill be dismissed and that this defendant have and recover of and from the plaintiffs her costs and disbursements of this suit.

WILL M. PETERSON and
RALEY and RALEY,
Attorneys and Solicitors for the Defendant Jennie Anderson Watts.

State of Oregon,
County of Umatilla,—ss.

On this 4th day of January, 1917, at Pendleton, in

Umatilla County and State aforesaid, before me personally appeared Jennie Anderson Watts, who being first duly sworn, deposes and says on oath, that she is one of the defendants named in the foregoing answer, that she has read the foregoing answer and knows the contents thereof, and that the same is true of her own knowledge, except as to such matters therein as are stated on information and belief, and as to those matters, she believes them to be true.

JENNIE ANDERSON WATTS. **[52]**

Subscribed and sworn to before me this 4th day of January, 1917.

[Seal] J. H. RALEY,

Notary Public for Oregon.

My com. expires Mar. 16, 1917.

Service of within and foregoing answer by receipt of a certified copy thereof is hereby accepted and all further service thereof is hereby waived this —— day of January, 1917.

JAMES A. FEE,

One of Attys. for *Complaint.*

Filed January 4, 1917. G. H. Marsh, Clerk. **[53]**

And afterwards, to wit, on the 25th day of January, 1918, there was duly filed in said court a petition for the appointment of a guardian *ad litem* for Vernita Watts, in words and figures as follows, to wit: **[54]**

In the District Court of the United States for the District of Oregon.

JERUSHA CRAB and JOHN CRAB, Husband and Wife,

Plaintiffs,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS, and VERNITA WATTS,

Defendants.

Petition for Appointment of Guardian Ad Litem for Vernita Watts.

Come now Marvel Watts, Jennie Anderson Watts and Vernita Watts, three or the defendants above named and respectfully represent to the Court as follows:

I.

That the said defendants, Marvel Watts and Jennie Anderson Watts, are husband and wife and are the parents of the defendant, Vernita Watts. That said defendant, Vernita Watts, as is alleged in paragraph numbered eleven (11) of the complaint of the plaintiffs on file herein, is an infant under the age of eighteen years; that she is over the age of fourteen years, to wit, of the age of fifteen (15) years; that she was born on the 8th day of April, A. D. 1901, and resides with her said parents, Marvel Watts and Jennie Anderson Watts, at Athena, Umatilla County, Oregon; that she has no general guardian.

II.

That Will M. Peterson, J. H. Raley and J. Roy Raley, attorneys at law, are residents and inhabitants of Pendleton, Umatilla County, Oregon, and are officers of this court. They have been retained by these defendants in this suit to represent them in this cause, and all of the defendants, except the said Vernita Watts, have caused their answers to be [55] filed herein, reference to which is hereby made for the further information of the Court, and particularly to show to the Court that these defendants are not adversely interested in the subject matter of this suit and that also the said attorneys of these defendants are not adversely interested to the said Vernita Watts or with the attorneys of the adverse parties.

At a conference of these defendants and their said attorneys, it has been decided that the said Will M. Peterson would be a suitable person in every way to be appointed guardian *ad litem* for the said defendant, Vernita Watts, and he has signified his willingness to accept said appointment, if appointed by the Court; and if it should not be agreeable to the Court to make the said appointment, the said J. H. Raley or the said J. Roy Raley may be appointed, if either one of them should appear to the Court to be more suitable.

III.

That personal service of subpoena has been heretofore made, in the above-entitled court and cause upon the said Vernita Watts, as well as upon the other defendants herein, and the said defendant,

Vernita Watts, is very materially interested in the subject matter of the said suit and, for the further information of the Court, the complaint of the plaintiffs in this cause is now hereby referred to for the purpose of familiarizing the Court with the necessity of the appointment of a guardian ad litem for the said defendant, Vernita Watts.

WHEREFORE, your petitioners pray that Will M. Peterson of Pendleton, Oregon, may be appointed guardian *ad litem* for the defendant, Vernita Watts, to appear and defend said suit on her behalf.

Dated this the 22 day of January, A. D. 1917.

MARVEL WATTS,
JENNIE ANDERSON WATTS,
VERNITA WATTS,
Petitioners. **[56]**

State of Oregon,
County of Umatilla,—ss.

I, Marvel Watts, after being first duly sworn, say that I am the father of Vernita Watts, one of the defendants above named; that I am also one of the defendants above-named; that I have read the foregoing petition and verily believe the contents thereof to be true, that the signatures of the defendants, Vernita Watts and Jennie Anderson Watts, to the foregoing petition were written by them in my presence and are genuine.

MARVEL WATTS.

Subscribed and sworn to before me on this 22 day of January, A. D. 1917.

[Seal] B. B. RICHARDS,
Notary Public for Oregon.

My commission expires Mch. 12, 1917.

State of Oregon,
County of Umatilla,—ss.

I, Will M. Peterson, hereby certify that I have read the foregoing petition for appointment of guardian *ad litem;* that I verily believe the contents thereof to be true; that I will accept the appointment of guardian *ad litem* for Vernita Watts, one of the defendants above named, if I am appointed by the Court, and will thereupon appear and defend said suit on her behalf to the best of my ability.

WILL M. PETERSON. [57]

Subscribed and sworn to before me on this 23d day of January, A. D. 1917.

[Seal] FRANCES WEBER,
Notary Public for Oregon.

My commission expires Dec. 10, 1919.

Filed Jan. 25, 1917. G. H. Marsh, Clerk of United States District Court for the District of Oregon. [58]

And afterwards, to wit, on Thursday, the 25th day of January, 1917, the same being the 69th judicial day of the regular November, 1916, term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge presiding—the following proceedings were had in said cause, to wit: [59]

In the District Court of the United States for the District of Oregon.

JERUSHA CRAB and JOHN CRAB, Husband and Wife,

Plaintiffs,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS, and VERNITA WATTS,

Defendants.

Minutes of Court—January 25, 1917—Order Appointing Guardian Ad Litem.

The petition of Marvel Watts, Jennie Anderson Watts, and Vernita Watts, three of the defendants above named, for the appointment of a guardian *ad litem* for the defendant, Vernita Watts, now comes on to be heard; and it appearing to the Court that the said defendant, Vernita Watts, is an infant under the age of eighteen years, but over the age of fourteen years, to wit, of the age of about fifteen (15) years and that she has no general guardian; that the said defendants, Marvel Watts and Jennie Anderson Watts, are husband and wife and are the parents of the said defendant, Vernita Watts. That Will M. Peterson of Pendleton, Umatilla County, Oregon, has signified his willingness to accept the appointment of guardian *ad litem* for the said Vernita Watts, and that he is a competent and responsible person, an attorney of this Court, and is the choice of said defendants as said guardian; and

the Court being advised in the premises:

It is now therefore ordered that the said Will M. Peterson be, and he is hereby, appointed guardian *ad litem* for the said defendant, Vernita Watts, and is authorized and directed to appear and defend said suit on her behalf and is hereby given ten days from date hereof in which to [60] answer the complaint of the plaintiffs on file herein.

Dated this 25th day of January, A. D. 1917.

R. S. BEAN,
District Judge.

Filed Jan. 25, 1917. G. H. Marsh, Clerk U. S. District Court for Oregon. [61]

And afterwards, to wit, on the 2d day of February, 1917, there was duly filed in said court, an answer of Vernita Watts, in words and figures as follows, to wit: [62]

In the District Court of the United States for the District of Oregon.

JERUSHA CRAB and JOHN CRAB, Husband and Wife,

Plaintiffs,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS and VERNITA WATTS,

Defendants.

Separate Answer of Vernita Watts, a Minor, by Will M. Peterson, Her Guardian Ad Litem.

Comes now the defendant, Vernita Watts, by Will M. Peterson, her duly appointed guardian *ad litem,* and answering plaintiff's bill of complaint filed herein, for herself and for herself alone, DENIES, ADMITS, AVERS and ALLEGES as follows:

I.

ADMITS paragraph I of said bill of complaint, and the whole thereof.

II.

ADMITS paragraph II of said bill of complaint, and the whole thereof.

III.

And answering paragraph III of said bill of complaint this answering defendant ADMITS that said Thomas Watts died intestate on the 20th day of April, 1914, but DENIES that at the date of his death he was the owner of the west half of the southeast quarter, or the southeast quarter of the southwest quarter of section 32, township 5 north, range 35 E., W. M., or any part thereof, or was the owner of the south half of section 30, township 5 north, range 35 east, W. M., or of any portion thereof, and AVERS the fact to be that at the time of the death of the said Thomas Watts on the 20th day of April, 1914, this defendant, Vernita Watts, was the owner of the south half of section 30, in township 5 [63] north, range 35 east, W. M., and another of these defendants, to wit, Jennie Anderson Watts, was the owner of the west half of the southwest quarter, and

the southeast quarter of the southwest quarter of section 32, in township 5 north, range 35 east, W. M., subject only to a life interest existing in the said Thomas Watts at the time of his death, and AVERS the fact to be that upon the death of the said Thomas Watts the said Jennie Anderson Watts became the absolute owner in fee simple of the said last-described tracts of land, freed from the said life estate of the said Thomas Watts.

IV.

ADMITS that the estate of the said Thomas Watts has been fully administered upon in the County Court of the State of Oregon for Umatilla County, and said administration has been duly closed and the administrator discharged.

V.

And answering paragraph V of said bill of complaint, this answering defendant ADMITS that for a considerable time prior to the death of the said Thomas Watts he was old and feeble in body and was sick in body, but DENIES that the said Thomas Watts was at all feeble in mind or that he was at all mentally weak or was at all easily influenced, or was at all incapable of doing business, or was at all not of intelligent comprehension of his affairs, or was at all not of a conscious or intelligent making or disposition of his property among those entitled to his bounty, and AVERS and ALLEGES the fact to be that at all times prior to and up to two days prior to the date of the death of the said Thomas Watts he was strong and firm in mind and was mentally capable of doing business, and was fully possessed

of an intelligent comprehension of his affairs, and was thoroughly competent to make a conscious and intelligent disposition of his property [64] among those entitled to his bounty and otherwise; and DENIES that shortly before the death of the said Thomas Watts, or at any time before or at all or while Thomas Watts was on his deathbed or suffering from his last sickness, or so incapacitated as stated in plaitniff's bill of complaint, or at all or at any other time, this defendant conspired with either or any of the other defendants or anyone else, or at all conspired in any manner to cheat or defraud the plaintiff, Jerusha Crab, or anyone else, out of her interest in her father's estate, or to secure a deed purporting to be a deed from said Thomas Watts to the said Jennie Anderson Watts for the west half of the southeast quarter, or the southeast quarter of the southwest quarter of section 32, township 5 north, of range 35 east of the Willamette Meridian, or any part thereof, or to secure or procure a deed to the said Vernita Watts for the south half of section 30, township 5 north, range 35 east, W. M., or any part thereof, or at all, or that this defendant, with the other defendants or either or any one of them, in any manner either did conspire together or did at all influence or induce the said Thomas Watts to make said deeds or either thereof; ADMITS that the lands described included all of the lands of the said Thomas Watts, except 80 acres, and ADMITS that said 80 acres was barely sufficient in value to pay for the mortgage which existed and to pay the necessary funeral expenses and ex-

penses of administering the estate, and this defendant DENIES that she did or that any of the defendants with her knowledge did in any manner procure a deed purporting to be executed by the said Thomas Watts, giving to the said Jennie Anderson Watts the said west half of the southeast quarter, or the southeast quarter of the southwest quarter of said section 32, or any part thereof, or to the defendant Vernita Watts [65] the south half of section 30, or either or any part thereof; ADMITS that this defendant caused said deeds to be recorded in the Deed Records of Umatilla County, Oregon, and ADMITS that said signatures to said deeds were not in the handwriting of said Thomas Watts, but purported to have been signed by making his mark, and this answering defendant alleges that she was not present at the time the said deeds were signed or executed, but is informed and believes and therefore alleges upon information and belief that the said deeds were signed by the said Thomas Watts by making his mark.

VI.

DENIES that said deeds or either of them was wholly or at all without any valuable or other consideration, and avers and alleges the fact to be that Jennie Anderson Watts was and is a daughter-in-law of the deceased, and this defendant Vernita Watts was and is a granddaughter of the deceased, Thomas Watts, and that for more than five years prior to the date of the death of the said Thomas Watts he had lived with and made his home with Jennie Anderson Watts and this defendant and the

defendant Marvel Watts, and during all of said time this defendant and the defendant Jennie Anderson Watts had cared for and looked after the welfare and comfort of the said Thomas Watts, and this defendant avers and alleges the fact to be that said deeds and each of them were executed and delivered for a good and valuable consideration, and this defendant further says that she has no personal knowledge of the immediate conditions under which the said deeds were executed, and therefore DENIES upon information and belief that the said deeds, or either of them, were at all secured from the said Thomas Watts when he was not fully conscious or was mentally incapacitated from making such conveyances, or that they were, or either of them was obtained **[66]** from him either by or through fraud or deceit or undue influence, or by taking advantage of his mental or physical condition, or that said deeds were secured or obtained when the said Thomas Watts was sick at the home of the defendant, Homer I. Watts, or when the only other person present was a witness secured by said defendant, Homer I. Watts, and DENIES on information and belief that said deeds or either of them were not the conscious or intelligent act of the said Thomas Watts, or that he had no intention or purpose of disposing of the said property or conveying it as set forth in said deeds, and DENIES that in equity or good conscience or at all or for any reason said deeds or either of them was fraudulent or void or of no effect, and this answering defendant AVERS the fact to be that she is informed and believes that

the said deeds and each of them were duly and regularly executed and delivered by the said Thomas Watts at a time when he was mentally capable in every way of making, executing and delivering said deeds, and that the said deeds and each of them are the conscious and intelligent act of the said Watts and that the said deeds, and each of them, are valid and in full force and effect, and therefore this defendant alleges upon information and belief that the said deeds and each of them were so executed by the said Thomas Watts, and are valid and subsisting conveyances of the said lands.

VII.

DENIES that the said Jerusha Crab is the owner in equity or otherwise or at all, by virtue of inheritance from her father or otherwise, of an equitable one-third interest or of any interest at all in all or any of the real property described in said complaint, and DENIES that she is a tenant with the said Homer I. Watts or Marvel Watts, or either of them, and DENIES that the said Homer I. Watts or the said Marvel **[67]** Watts or either of them are the owners of the other two-thirds of said lands, or of any interest whatever in or to said lands, and avers and alleges the fact to be that Jennie Anderson Watts is the sole and only owner of the west half of the southeast quarter, and the southeast quarter of the southwest quarter of section 32, and that this defendant is the sole and only owner of the south half of section 30, all in township 5 north, of range 35 east, W. M. ADMITS that said deeds as recorded make it appear upon the record of said county that

the said Jerusha Crab is not the owner of any interest therein, but this defendant avers and alleges the fact to be that the said deeds so recorded correctly represent and describe the true owners thereof.

VIII.

DENIES that the said Homer I. Watts or the said Marvel Watts or any of the other defendants have any arrangements between themselves, whereby either the said Homer I. Watts or the said Marvel Watts are to be the real owners or any owners of said lands, or any interest therein, or to receive the benefits from said lands, except as tenants under the terms and conditions hereinafter set forth, and DENIES any knowledge or information sufficient to form a belief as to whether or not the deeds were procured in the form they were solely or at all for the purpose of enabling said Homer I. Watts to take the acknowledgment of said deeds without calling in a third or disinterested party, and therefore this defendant DENIES said allegations upon information and belief.

IX.

DENIES that the one-third interest of the said plaintiff, Jerusha Crab, in said property, is of the value of more than $3,000, or is of any value whatever, and DENIES that the said Jerusha Crab has any one-third interest or any other interest at all in said property or any part thereof. **[68]**

X.

ADMITS that after the death of the said Thomas Watts and the recording of said deeds Jennie Anderson Watts did take possession of the west half of

the southeast quarter and the southeast quarter of the southwest quarter of section 32, and that this defendant, Vernita Watts, did go into possession of the south half of section 30, all in township 5 north, of range 35 east of the Willamette Meridian, but DENIES that they or either of them ousted the plaintiff, Jerusha Crab, of the possession thereof, or that either this defendant or the said Jennie Anderson Watts is wrongfully claiming the sole ownership thereof. ADMITS that they have ever since kept the sole possession of the same, except respecting the leases hereinafter mentioned, and ADMITS that these defendants have taken and received sums of money as rents and profits from said lands, in the manner and to the extent hereinafter set forth.

XI.

ADMITS that the said Vernita Watts is an infant under the age of eighteen years, and AVERS the fact to be that this defendant, Vernita Watts, is now a minor and is of the age of about fifteen years, and now is and at all times herein mentioned was a resident of the county of Umatilla and State of Oregon; that on the 25th day of January, 1917, and prior to the filing of this answer in this cause, an order was duly given, made and entered by one of the Judges of the above-entitled court, whereby the above-named Will M. Peterson was appointed the guardian *ad litem* of said minor for the purpose of defending the interests of the said minor in this cause, and that said order was so given, made and entered upon due and regular application having been made therefor, and the said Will M. Peterson is now the

duly and regularly [69] appointed, qualified and acting guardian of the minor defendant, Vernita Watts.

XII.

And further answering plaintiff's demand for a discovery, this defendant says and alleges, that to the utmost and best and all of her knowledge, information and belief, neither of said deeds was a forgery, and therefore alleges upon information and belief, that neither of said deeds was a forgery, and does further say that to the utmost of her knowlege, information and belief, both of said deeds were the free act of the said Thomas Watts, and therefore she does aver and allege upon information and belief that both of said deeds were the free act of the said Thomas Watts, and to the utmost of her knowledge, information and belief, does say that the name of the said Thomas Watts to said deeds was not written thereon by the said Thomas Watts, but that the name T. J. Watts to each of said deeds was written by the defendant, Homer I. Watts, in the presence of the said Thomas Watts and in strict accord with his directions and at his request, and at a time when he was possessed of his full mental faculties and knew just what he was doing and why he was doing it, and that the said Thomas Watts knew and fully understood the contents of said deeds and each of them at the time they were signed, and that the said Thomas Watts was in full possession and exercise of his mental faculties and was fully conscious of everything that was done respecting said deeds, and that the said Thomas Watts at that time and in that

condition directed the defendant, Homer I. Watts, to make his cross for him and did touch the pen while the cross was being made, in the presence of the defendant Homer I. Watts, and in the presence of G. M. Jonas, who did then and there, while [70] in the exercise of full mental consciousness, and while possessed of his full mental faculties, acknowledge the said deeds to be his free and voluntary act and deed, and thereafter delivered the said deeds to the said Homer I. Watts and did instruct the said Homer I Watts to record the same or to cause the same to be recorded and to be delivered to the parties entitled to receive them, and therefore this answering defendant being without personal knowledge thereof, alleges this statement of facts to be true upon information and belief.

XIII.

And further answering plaintiff's demand for discovery, this defendant says and avers and alleges that the defendants, Homer I. Watts and Marvel Watts, are operating the lands of this defendant as partners under a lease from this defendant to them, that they are operating the lands of the said Jennie Anderson Watts as partners under a lease to them, and by virtue of the agreement of lease and rental existing between this defendant and the said Homer I. Watts and Marvel Watts as partners, and existing between the said Jennie Anderson Watts, and Homer I. Watts and Marvel Watts as partners, the said Homer I. Watts and Marvel Watts as partners pay as rental for the use of said lands one-third of the crops produced from said lands, delivered at the

warehouse on the railroad in sacks; said sacks are furnished by the said partnership, and in addition thereto, the said partnership pays all insurance upon the crops so raised.

XIV.

And further answering plaintiff's demand for discovery, this defendant says and avers and alleges the fact to be that of the lands standing in the name of Jennie Anderson Watts there has been but one crop harvested since the death of the said Thomas Watts; that during the year 1914 the tillable [71] land on said premises was in summer fallow and no crop was raised therefrom; that during the year 1916 the said land was in summer-fallow and no crop was raised thereon; that a crop of wheat was raised upon the said premises during the year 1915, and that the said crop so raised during said year consisted of 2,028 sacks of wheat, containing 4,201-20/60 bushels, and that the said crop was sold to the Preston Shaffer Milling Company at Athena, Oregon, at 80 cents per bushel, and this defendant received as rental for the use of said lands the one-third thereof, to wit, the sum of $1,120.35, and no more; and that of the lands belonging to this defendant, crops were raised thereon during the years 1914 and 1915, but no crop was raised thereon during the year 1916, but said lands being in summer-fallow; that there was raised on said lands as the crop of 1914, 2,865 sacks of wheat, containing 5,766-40/60 bushels, and that said wheat was sold to the Preston-Shaffer Milling Company for 67 cents per bushel, and this defendant received as rental for

the use of said lands during the year 1914 the sum of $1,287.85, and that there was raised upon said lands so belonging to this defendant during the year 1915, 1085 sacks, containing 2,250–2/60 bushels, and the said wheat was sold to the Preston Shaffer Milling Company for 85 cents per bushel, and this defendant received one-third thereof, to wit, $637.50, and no more; and this answering defendant says that both the lands of this defendant and of the said Jennie Anderson Watts have been under lease to the said Homer I. Watts and Marvel Watts as partners ever since and for a long time prior to the death of the said Thomas Watts, and that the lands are now so under lease from this defendant and the said defendant, Jennie Anderson Watts, to the said partnership of Homer I. Watts and Marvel Watts.

And this defendant having fully answered plaintiff's [72] bill of complaint, but not under oath because made by guardian *ad litem,* now prays judgment and decree that the said bill be dismissed and that this defendant have and recover of and from the plaintiff her costs and disbursements of this suit.

WILL M. PETERSON and
RALEY and RALEY,
Attorneys and Solicitors for the Defendant Vernita Watts.

State of Oregon,
County of Umatilla,—ss.

On this 30th day of January, 1917, at Pendleton, Umatilla County and State aforesaid, before me personally appeared Will M. Peterson, who being first duly sworn, deposes and says on oath, that he is

the duly appointed, qualified and acting guardian *ad litem* of Vernita Watts, a minor, the defendant named in the foregoing answer; that he has read the foregoing answer and knows the contents thereof; that he has no personal knowledge of the matters set forth in said answer, but upon information furnished him, believes the same to be true and therefore, as guardian *ad litem* for the defendant, makes oath upon information and belief that he believes the said matters therein stated are true.

WILL M. PETERSON.

Subscribed and sworn to before me this 30th day of January, 1917.

[Seal] J. H. RALEY,

Notary Public for Oregon.

My commission expires March 16, 1917.

Service by copy of the within answer is hereby accepted at Pendleton, Oregon, this —— day of Janry., 1917.

JAMES A. FEE,

One of Atty. for *Complaint.*

Filed Feb. 2, 1917. G. H. Marsh, Clerk U. S. District Court for Oregon. [73]

And afterwards, to wit, on the 25th day of March, 1918, there was duly filed in said court an opinion, in words and figures as follows, to wit: [74]

In the District Court of the United States for the District of Oregon.

No. 7340.

JERUSHA CRABB and JOHN CRABB, Husband and Wife,

Plaintiffs,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS, and VERNITA WATTS,

Defendants.

Opinion.

JAMES A. FEE and A. S. BENNETT, for Plaintiffs.

WILL M. PETERSON and RALEY & RALEY, for Defendants.

WOLVERTON, District Judge:

On April 14, 1914, Thomas J. Watts signed two deeds by his mark, one purporting to convey to Jennie Anderson Watts 120 acres of land, and the other to convey to Vernita E. Watts 320 acres, all in Umatilla County, Oregon. The instruments were acknowledged before Homer I. Watts, notary public. The plaintiff Jerusha Crabb, who is a daughter of Thomas J. Watts, and her husband, John Crabb, feeling themselves aggrieved, are seeking by this

controversy to have these deeds annulled, on the grounds: First, that the grantor was at the time incapacitated to make the deeds; and, second, that he was induced to make them through undue influence exerted by the defendants [75] Homer I. Watts, Marvel Watts, Jennie Anderson Watts, and Vernita Watts. Homer and Marvel are the sons of Thomas J. Watts, and are his only children and heirs-at-law except the plaintiff Jerusha Crabb. Jennie Anderson Watts is the wife of Marvel, and Vernita is their daughter.

Thomas J. Watts died intestate, on April 20th, six days after the deeds were executed. He was in his 83d year at the time of his death, and had grown very feeble, both physically and mentally. When in health and vigor, he was a man of positive habits, and asserted his own judgment in his dealings with others. The last few years of his life, when his health had become somewhat impaired, he leased his lands to his sons Homer and Marvel, on shares, and they accounted to him for his share in the crops. Marvel, perhaps generally, sold his grain, and either passed the proceeds to him or to the bank to his account. He also paid his taxes and transacted other business for him when he was away. There was therefore this fiduciary relation existing between Homer and Marvel Watts and the deceased.

Deceased was twice married. Jerusha Crabb is the daughter of the first wife, and Homer and Marvel are the sons of the second, making them half-brothers of Jerusha.

When she was six years old, Jerusha went to live

with her uncle, Marvel Watts, and shortly afterward—within a year—the deceased married a second time. Jerusha continued to live with her uncle until she was [76] married to Crabb. In the meantime she saw and visited with her father and he with her occasionally. When her uncle died, she shared in his estate, finally realizing therefrom $10,000, less a considerable expense in obtaining the money. The net amount that she finally received was around $9,000. After her marriage, she kept in touch with her father, through meeting him occasionally and correspondence, down to the time when the deceased and his second wife were divorced, which was in the year 1908. After that, the deceased visited with Jerusha frequently, and at times he made his home with her, extending over periods of from a week to three months. In the latter three years of his life, he wrote to her very frequently, and for some periods as often as once every week. Generally, however, after his divorce, he made his home with his son Marvel, in Athena, Oregon. Some of the time he was in Southern California, on account of his health. At other times he stopped in Spokane, and with Mr. Skelton, near Kennewick, Washington. In this way he went about as he desired, having practically retired from active business.

In the fall of 1913, late fall perhaps, the deceased went to Santa Ana, Southern California, and remained there until the latter part of February, 1914. His health failing, so that he could not care for himself as he wished, he wrote to Jerusha, saying in effect that some of them would have to come after

him. Mrs. Crabb wrote to her brother Marvel about it. About the same [77] time Page, a friend of deceased, wired Marvel to come for him and bring him home. Marvel went for his father, and brought him back. He thinks they returned the latter part of February or first of March; he was not able to fix the date. The deceased was taken to Marvel's home. Marvel is of the impression that some time later his father received a letter from Jerusha, but is not sure about it. At least, he did not read the letter, and did not know its contents. Mrs. Crabb makes no mention of having written such a letter.

Marvel says that on March 16th or 17th he took "father up there (to Jerusha's) at my own father's request." Jerusha says it was the 17th that they came.

The Crabbs live near St. John, Washington. When the deceased came there, he was quite feeble, and unable to move about without support. The next morning, or the day after he arrived at his daughter's home, in talking about his business and property, he told her that he had made a will, and requested her to send for it, giving as his reason that he "didn't want it; it didn't suit him." The daughter had no previous knowledge of his having made a will. She declined to send for the will as requested. Deceased then asked her husband to send for it, and he also declined. He then requested W. D. Parker, a neighbor, to write for it. Parker wrote to Mr. Fay Le Grow, cashier of the First National Bank of Pendleton, who had the custody of the document, to send it up to the old gentleman. This was on the 24th of

March. The will was forwarded, and was received by the [78] deceased on the 27th. Watts signed a confirmatory letter of that date, and dated the same in his own hand. When the will was received, without opening the envelope in which it was sealed, he requested his daughter to put it away, which she did. Shortly afterwards—a few days—he asked her to get the will for him. He then opened it, and read it, and asked his daughter to burn it. This she declined to do; but, at the suggestion of Viola Crabb (now Wheeler), a daughter of Mrs. Crabb, he put the will in the stove himself, and it was burned. Viola opened the stove for him, and helped him up, and he dropped the paper in.

Unknown to deceased, Mrs. Crabb read the will over his shoulder. It bore the date October 25, 1910, and gave to Mrs. Crabb $200, and the remainder of the property to Homer and Marvel Watts, share and share alike. The record shows that deceased had executed two other wills prior to that one. One of them was executed in 1899. By this will he gave to his wife the place he had in Athena, and 160 acres of land besides, some money, perhaps $100, to Mrs. Crabb, and the remainder of his property to his three boys, to be divided equally among them. There were then three sons living. The other will was executed November 25, 1905. By that he gave to Jerusha $10, and the remainder of his property to his wife and his two sons, Marvel and Homer. The bequests in these several wills seemed to be in accord with declarations [79] testator had made from time to time to his friends and persons of his acquaintance, run-

ning down to near the time when he went to his daughter's.

When the will was destroyed, deceased gave expression to his thought, "Now it is done, and they will all share equal." This is what Mrs. Wheeler understood him to say. Mrs. Crabb understood him to say, "Now it is done," with a laugh, "you shall have your share equal." These were the only two witnesses to the incident.

On the 3d of April, Mr. Watts was taken seriously ill, and Dr. McIntyre was called. His trouble was sciatica in the right leg, and bladder affection. Dr. Mitchell was called into consultation, and an anesthetic was administered before he was relieved. Dr. McIntyre is not certain as to the day the consultation took place and the relief had, but is of the impression that it was not long after he was first called. The deceased was left in a greatly weakened condition physically, and thereafter had to be taken from and put to bed; he was unable to feed himself, and, to a certain extent, had lost the use of his hands.

Marvel, with his mother, wife and daughter, went up from Athena to visit his father, on the 3d of April. This was on Friday. The mother and daughter returned on Sunday, and Marvel and his wife remained until Monday. Considerable conversation was had among them and with the old gentleman. This will be referred to later. [80]

Mrs. Crabb told Marvel, soon after his arrival, that the old gentleman had destroyed his will. Marvel is of the belief that she said it was destroyed that morning, the 3d; but Mrs. Crabb denies that she

told him it was destroyed that morning, for, she says, it was destroyed some days before—Monday, Tuesday or Wednesday before.

Marvel went back to the Crabbs' place on the Friday following, being the 10th of April, and brought his father down to Athena the next day, the 11th. The father was carried from his bed to an automobile, and taken to the railroad station, some 7 or 8 miles distant, where he was put on an improvised stretcher or cot, and carried in the baggage-car of the train to Athena, a distance of some 140 miles. On his arrival at Athena he was taken on a dray to Homer's home. Mrs. Carden was called the next day to nurse him. On Sunday his divorced wife came over from Walla Walla to see him.

Now, we come to the incident of the execution of the deeds.

Homer relates that he heard part of the conversation between his father and mother; that his father wanted to provide further for his mother, but that she finally said: "Now, Tom, I don't know that I care about the property at all. The children that have made it are entitled to it, and I would just let it go that way." **[81]**

Homer further relates that, on the evening his father came to his (*Homer's*) home, he had a talk with him, and, after alluding to the destroying of the will, his father said: "I have made up my mind that I am going to do with my property as I suggested some time ago, that is, going to give a part of it to your mother, and I am going to provide for Vernita, because she is a cripple, and Marvel's wife,

and the balance of it I am going to leave to pay up the debts, and I hope you children will all get good friends, because you all have enough property. Now, let property not divorce you children any longer." Homer further relates that, on Sunday evening or Monday morning, his father directed him how to made the deeds, and then said to him: "Now, Homer, Jerusha understands how the property is to go and why she is not getting any of it, because it has been a mutual understanding that she got her property from Uncle Marvel; and Marvel will have no objections at all, because it goes into the family. * * * I think you children can get along better than you have in the past." Homer replied, "You know I have made my way so far, and I am going to make it the rest of the way; but * * * I would prefer to have somebody else write the deed." To this the father said, "Now, Homer, you are the only one that is going to cause a lawsuit in this matter, and I want you to attend to it for me, and attend to it right." And Homer said, "I will not cause a lawsuit in this matter, if I don't get a pleasant look from this [82] time out. * * * If you don't want any trouble, I will cause none." Further on he quotes his father as saying, "I have made up my mind what I am going to do with my property. * * * Now, Homer, I am not going to leave any of you anything, so you will have nothing to law about."

On Tuesday morning, about 11 o'clock, Homer took his father out in his automobile for a ride. They stopped at the drug-store in the town to get some medicine, and then proceeded on to the town of

Adams, about five miles distant. On returning to the house, Homer testifies that his father said, "Do you care if you drive me out to the ranch?" They started, but having driven part way out, his father told him that he would not be able to stand the ride, and so they returned to the house again. He was taken in the house, given something to eat while sitting in a chair, and then put on the bed. Homer then went to his office and drew the deeds, and returned to the house with Guy Jonas. Mrs. Carden, the nurse, had, either at that time or previously, signified her intention of going to her own home on some errand, and Homer told his wife to take her home in the car. This she did, and then took a ride, returning in 45 minutes or an hour later. Shortly after they left the house, Homer says, his father asked to be taken up. He and Jonas took him out in the sitting room, and set him in a chair. The deeds were then read to **[83]** him, and he signed them by making his mark; the pen being in the hands of Homer, the old gentleman touching it as the mark was made. The three persons—Homer, his father and Jonas—were all that were in the house at the time.

The old gentleman died the Monday following, at the hour of about eight o'clock in the morning, and the deeds were recorded at 11:20 and 11:25 o'clock of the same forenoon.

This is the story which terminated in the execution and recording of the deeds.

Now, to return to the time that the deceased was at the home of the Crabbs, in order to ascertain his

predisposition in disposing of his property after burning the will. He talked a great deal about his property before destroying the will, and was given to much repetition of what he had previously said on the subject, indicating that he wanted his daughter to share with the boys in what he had. At times he would shed tears, and was unable to control his feelings. After the will was destroyed, he seemed to be more resigned. When Marvel came to take him away, he at first did not want to go, but became reconciled to going. Mr. and Mrs. Crabb were also not willing that he should be taken away, but yielded, in consideration that it was thought that he would be better taken care of in Athena. The care that was taken of him while at the Crabbs' was not essentially [84] different from that accorded to him at Homer's home, except that a nurse attended him at the latter place. The Crabbs, however, were willing to provide a nurse for him, and would have done so if he had not been taken away. Marvel went to the Crabbs' with the express purpose of taking him away, and dominated the situation. He was asked: "Now, you insisted, then, on taking him away, did you?" To which he answered, "Why, I went up after him, yes. Q. What say? A. I went up after him. Q. Well, I say you insisted on taking him away? A. Well, I did take him away."

Dr. McIntyre thought it best that he be not removed, but yielded, as did Mr. and Mrs. Crabb, on the representation that he would be better taken care of in Athena.

The deceased seemed to be apprehensive that

Marvel had designs inimical to his (deceased's) wishes respecting his property. This appears from the conversations that took place between him and Marvel on the evening before and the morning on which they started for Athena. Two of these conversations were overheard by Mrs. Wheeler, and in the main by Mrs. Crabb, and the other by both, and by Mr. Crabb. In the first conversation he said, in effect, that he would not sign any papers; that if Marvel was taking him away to sign any papers, he would not go, and that he wanted the property to be divided equally among them. To this Marvel answered, "It will be as you want it." Mrs. Crabb's rendition of the **[85]** conversation is, that her father said: "Marvel, if you have come after me to take me down to make any papers, or to sign any papers, I won't go e'er a step." To this Marvel answered, "Father, we have no such intention as that. It shall be divided equal. I won't influence you to sign anything," or words to that effect. At another conversation, while Mrs. Crabb was in the kitchen, she and her daughter overheard her father ask Marvel if he would see that the property was divided equally between "us three, Marvel, Homer and myself." And Marvel said he would see that it was done, and asked his father, "What makes you worry that way," or "about it," or something that way. A little later Mr. Crabb was called in, and the old man took him by the hand, and said, "John. you and Jerusha has been so kind to me, on my word of honor, I want Jerusha to have her one-third of the property, and I want it divided equal." Then they

took him out to the automobile, and he was taken to the station.

Marvel denies that these conversations took place, but I am impressed with the truth of the statements.

Apart from the testimony above alluded to, Parker, a disinterested witness, relates that at the time the deceased asked him to write for the will, he told him (Parker) that he was not satisfied with it (the will), and said that Jerusha was his child, the same as the boys were, and he wanted her to have part of his [86] property.

Much has been said about the condition of deceased's mind from the time that he was taken ill until he was taken away from the home of the Crabbs. Dr. McIntyre's statement for this is as follows: "I don't believe, if he had been left to his own initiative, that he could have very well planned out anything that was at all complicated, at any rate." The doctor was of the opinion, from the time he first saw him, that he could not survive his illness.

Dr. Sharp, who attended the deceased after he was taken to Homer's, says that he was very feeble, weak, and exhausted; that he seemed to have had a general breakdown, but seemed to be perfectly rational, and so continued up to about Thursday or Friday. From that time on he was delirious.

Dr. McIntyre, from the time he was called in to see deceased at the Crabbs', administered a strong stimulant, consisting of strychnine, under which he would revive and seem brighter until its effects were lost.

The same stimulant was continued under Dr. Sharp's treatment. On Wednesday or Thursday the

patient began to show symptoms of pneumonia, which continued to develop until the time of his death. For this trouble an expectorant was administered.

Mrs. Carden, the nurse, says the deceased was rational up to the day he took the automobile ride, [87] and perhaps a day or two subsequently; that he seemed pretty bright on Sunday, but that she never talked much with him, and could not say whether he was in a condition to transact important business.

Other witnesses, neighbors of his, seemed to think that his mind was not impaired.

Several witnesses have given evidence to the effect that Watts had from time to time given expression to his attitude respecting the final distribution of his property, and that, generally, his thought seemed to be that while his wife was alive she should be provided for, to the extent that she should have plenty to supply her wants; that, Jerusha having obtained from her uncle Marvel a considerable sum, she was provided for substantially in accord with what his sons would have by an equal division of the estate between them, and that he was solicitous that they should have the residue of his estate after his debts were paid. But among all the witnesses produced, only two have given evidence of any expression of Watts that would seem in the least to indicate that it was his intention to give any of his property to Marvel's wife and daughter; that is, other than what Homer has to say on the subject. Marvel says that, along in the summer, before his father went to California, while they were out at the ranch, his father

asked him what he thought about remembering his (Marvel's) wife, and that he replied, [88] "Well, Daddy, it is just up to you. Do as you like." And Taylor testified that the old gentleman indicated to him that he was not satisfied with his will (the one that was destroyed), and in that connection said that "Marvel's wife would crawl on her hands and knees up the stairs to wait on him."

There is some testimony to the effect that the deceased had gotten the idea that Homer was not treating him as he should; that he did not come to see him as he thought he ought. Taylor speaks of this, and Dr. Sharp gives expression to some such idea.

Another matter that should be mentioned: When Homer took his father out for the ride on the day the deeds were executed, and father was adverse to going, but consented finally. Homer, himself, testifies as to this, as follows:

"I took him down town the one time. Q. Just the one time? A. Yes; against his wishes. Q. What say? A. Against his wishes. Q. You took him against his wishes, you say? A. Yes."

Dr. Sharp advised against it, and thought he ought not to go; that, in his weakened condition, he was not able to stand it.

The legal principles involved are not intricate, nor difficult of application. Where deeds are obtained by the exercise of undue influence over a man whose mind has ceased to be a safe guide to his actions, it is [89] against conscience for him who has obtained them to derive any advantage therefrom. Harding v. Handy, 11 Wheat. 103, 125. But it is not neces-

sary, in order to secure the aid of equity, to prove that the grantor was at the time insane, or in such a state of mental imbecility as to render him entirely incapable of executing a valid deed. It is sufficient to show that, from sickness and infirmity, he was at the time in a condition of mental weakness, and that there was gross inadequacy of consideration for the conveyance. From such circumstances, imposition or undue influence will be inferred.

Allore v. Jewell, 94 U. S. 506, 510.

A fiduciary relation existing between the grantor and those concerned in securing a benefit under the terms of the grant raises a presumption against validity, and casts the burden of establishing good faith upon the person asserting the regularity of the transaction. Clough v. Dawson, 69 Or. 52, 60; Jenkins v. Jenkins, 66 Or. 12, 17. And the secrecy with which the transaction is accomplished often furnishes a badge of fraud.

Wolf v. Harris, 57 Or. 276, 279.

The deeds in question were in reality executed causa mortis. It is hardly probable that any one of the participants engaged in the consummation of their execution believed that the father could survive for more than a short time. The deeds purport to have been given for the consideration of love and affection, **[90]** and one dollar.

While it may be conceded that the deceased was possessed of sufficient mentality for the final disposition of his property among his kindred, yet it cannot be denied that he was in a greatly weakened and debilitated condition, both physically and men-

tally. Dr. Sharp, his old physician, says: "He was very feeble, and weak, and exhausted," and had suffered a general breakdown. It is not doubted that a person in such a condition is readily susceptible to extraneous influences.

Now, we have the fact satisfactorily proven that he burned his will of his own volition, and that his declared purpose in doing so was that his children should share equally in his property, Jerusha included. This was manifestly the state of his mind when he left the home of the Crabbs. In three days thereafter, he deeded his property, not to his own sons or daughter, but to the wife and daughter of one of his sons—persons who had no direct claim on his bounty. This was absolutely contrary to all his declarations during the latter years of his life; a thing wholly unexpected, and unnatural to contemplate from his standpoint. No statement was ever made by him to anyone, unless it was to Homer, that he intended to give all his property to Marvel's wife and daughter. These things are in themselves sufficient to cast the burden upon the beneficiaries [91] under the deeds of establishing that the act of executing them was the free and voluntary act of the deceased, without instigation or direction of any other person. This the defendants have not done. But beyond this, there are suspicious circumstances that lead to the inference that both Marvel and Homer, especially the latter, participated in a plan to extort the deeds from the father. Marvel brought his father from the Crabbs' home to the home of Homer against his wish, until persuaded that it would

be better for him to make the move. Homer took his father for the ride against his positive wish and desire, and against the advice of his physician. Homer states that Marvel was present when he went for the drive, but is not sure about that. When he returned from his office, where the deeds were drawn, Homer requested his wife to take Mrs. Carden to her home on an errand. She was not only taken there, but they went for a drive afterwards, which consumed from three-quarters of an hour to an hour. In the meantime the deeds were executed, with none present except the deceased, Homer, and Jonas. The deeds were first delivered by Homer to Marvel the next day. Marvel gave them back to Homer for recording. The latter says he neglected to do it. They were then handed to the bank, with the result that they were gotten into the recorder's hands about **[92]** three hours after the death of the grantor. The incidents are unsatisfactorily explained. Further than this, the reason given why he wanted Homer to transact the business puts into the mouth of the father language most unlikely to have been uttered by him, considering the condition of his mind and the circumstances leading up to and attending the transaction. When Homer, according to his testimony, suggested to his father that he preferred that some one else should write the deeds, he relates that his father said, 'Now, Homer, you are the only one that is going to cause a lawsuit in this matter, and I want you to attend to it.'' A little later, when asked if he had related all that his father said about the destruction of the will, Homer replied: ''No; he said he made up his

mind thoroughly that he had heard so much property talk since he had been up there that he knew there was going to be trouble if he tried to divide the property as he had expected to in life, and he thoroughly made up his mind that he would deed it all away instead of deeding portions, as he had talked to me before. And another thing he said, 'Now, Homer, you are the most likely one to cause a lawsuit, and I am going to insist on you fixing the property, put you on your honor that you are not going to deal with the property or cause any lawsuits.' " And Homer says further: "I told him that I was a good loser." [93]

The attempt of the witness manifestly is to impute to his father a reason for not deeding his property as he had talked of before, which was that, if he did so, there was going to be trouble; yet he did the very thing that would not only not avoid trouble from the source Homer alludes to, but was calculated to drive Homer to a contest. Then the reasoning proceeds that, in order to prevent him from making trouble, the deceased insisted that he (Homer) draw the deeds, for thus he would be in honor bound not to attack them.

Such reasoning was entirely too complex for the old gentleman's understanding at that time; it is delusive, and is really what, in the nature of things, would not have happened.

The reference to previous trouble between the children has but a semblance of testimony in the record to support it.

After a very careful consideration of the entire controversy, I am irresistibly impelled to the conclu-

sion that, while the deceased was probably possessed of a disposing mind, yet that it was very weak, as he was physically, and that, his mind being in such weakened condition, he was imposed upon and unduly influenced to execute the deeds in question.

The decree will therefore be that the deeds in controversy be annulled and set aside, and that plaintiffs recover their costs and disbursements. **[94]**

As to the accounting, it appears from the answers of the defendants and the testimony that all the lands covered by the deeds were rented to Homer and Marvel on shares, the rental being one-third of the crops produced; the lessees to pay the expenses of production.

There was produced on the lands claimed to have been conveyed to Jennie Anderson Watts, in 1915, wheat amounting to 2,028 sacks, which was sold for $3,361.06. There was produced on the lands claimed by Vernita, in the year 1914, wheat amounting to 2,865 sacks, which was sold for $3,863.60; and in the year 1915, 1,085 sacks, sold for $1,912.50; making a total of receipts from crops during these years of $9,137,21. Jerusha Crabb's interest in this is $1,015.25. To this should be added one-ninth interest in the crops for 1917, respecting which no testimony has been adduced. From the sum of these amounts should be deducted one-third of the taxes on these lands that have been paid by the defendants since the death of Thomas J. Watts. The balance would represent the amount of the rents and profits that the plaintiff Jerusha Crabb would be entitled to recover from defendants.

Let an order be entered at the foot of the decree making a reference for ascertaining the further receipts of rents and profits, and the amount of taxes paid by defendants on the lands in question.

Filed March 25, 1918. G. H. Marsh, Clerk U. S. Court for the District of Oregon. By K. F. Frazer, Deputy. [95]

And afterwards, to wit, on Monday, the 15th day of April, 1918, the same being the 37th judicial day of the regular March, 1918, term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge presiding—the following proceedings were had in said cause, to wit: [96]

In the District Court of the United States for the District of Oregon.

JERUSHA CRAB and JOHN CRAB, Husband and Wife,

Plaintiffs,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS, and VERNITA WATTS,

Defendants.

Minutes of Court—April 15, 1918—Decree.

This cause came to be heard before this Court at Pendleton, Oregon, at the April term for the year 1917, and the testimony having been taken before the Court and the cause submitted by counsel upon writ-

ten argument and thereupon upon consideration thereof it was and is ordered, adjudged and decreed as follows, viz.:

I.

That the plaintiffs, John Crab and Jerusha Crab, are husband and wife, and that said plaintiffs were at the commencement of this suit, and now are, citizens, residents and inhabitants of the State of Washington, and that the defendants and each and all of them were at said time and still are residents and inhabitants of the State of Oregon, and that this suit is a suit and controversy of a civil nature between citizens of different states, to wit, between citizens of the State of Washington on the one side and citizens of the State of Oregon on the other, and that the matter in controversy herein exceeds, exclusive of interest and costs, the sum and value of three thousand dollars.

II.

That the plaintiff, Jerusha Crab, and the defendants, **[97]** Homer I. Watts and Marvel Watts, are the sole heirs at law of Thomas Watts, deceased.

III.

That said Thomas Watts died intestate on the 20th day of April, 1914, and that at the time of his death he was the owner of the following-described property situated in Umatilla County, in the District of Oregon, to wit:

> The west half (W.½) of the southeast quarter (SE.¼), and the southeast quarter (SE.¼) of the southwest quarter (SW.¼) of section 32, township 5 N., range 35 east, W. M., also the

south half (S.½) of section 30, township 5 N., range 35 east, W. M.

IV.

That the estate of said Thomas Watts has been duly administered upon in the County Court for the State of Oregon for Umatilla County and said administration has been duly closed and the administrator discharged.

V.

That for a considerable time prior to the death of the said Thomas Watts he was very old and feeble in mind and body and was sick and mentally weak and easily influenced.

That shortly before the death of said Thomas Watts and while he was on his deathbed and suffering from his last sickness and so sick and mentally weak and easily influenced, the said defendants, Homer I. Watts and Marvel Watts, procured from the said Thomas Watts a deed purporting to be a deed from said Thomas Watts to the defendant, Jennie Anderson Watts for the following-described portion of said real property, to wit:

The west half of the southeast quarter (W. ½ SE. ¼), and [98] the southeast quarter of the southwest quarter (SE.¼SW.¼) of section 32, township 5 N., range 35 east, W. M.,

and did at the same time procure from him a deed to the said Vernita Watts for the portion of said real property owned by him described as follows, to wit:

The south half (S.½) of section 30, township 5 north, range 35 east, W. M.

which tracts taken together covered and included all

of the land and all of the property owned by the said Thomas Watts at the time of his death except one eighty acres, which was of barely sufficient value to pay off the mortgage which existed upon said real property and to pay the necessary funeral expenses and the expense of administering his estate and that immediately after his death they caused said deeds to be recorded upon the deed records of Umatilla County, Oregon.

VI.

That said deeds and each of them were wholly without any valuable consideration and that the same were secured from the said Thomas Watts by fraud and deception and undue influence and by taking advantage of his enfeebled mental and physical condition, and the said deeds were not the voluntary and intelligent act of said Thomas Watts, and that in equity and good conscience said deeds are fraudulent, void, and of no effect.

VII.

That said plaintiff, Jerusha Crab, is owner in equity, by virtue of inheritance from her father of an undivided one-third interest in all of the real property hereinbefore described, to wit:

> The west half of the southeast quarter, and the southeast quarter of the southwest quarter of section 32, and the **[99]** south half of section 30, all in township 5 N., range 35 east, W. M.,

as tenant with the said Homer I. Watts and Marvel Watts, but that the said deed as recorded makes it appear upon the records of said county that she is not the owner of any interest therein.

VIII.

That the one-third interest of this plaintiff, Jerusha Crab, in said property is of the value of more than three thousand dollars.

IX.

That the defendants, Jennie Anderson Watts and Vernita Watts, are seeking to take advantage of the wrongful and fraudulent action of the defendants, Marvel Watts and Homer Watts, as hereinbefore set forth, and are claiming the benefit of said deeds and claiming to own the said real property thereunder, and that immediately after the death of said Thomas Watts and the recording of said deeds, the defendants herein went into the sole possession of the said property and have ever since kept the sole possession of the same and continue to oust the plaintiffs and have received from the rents and profits of said property large and considerable sums of money, as hereinafter set forth.

NOW, THEREFORE, it is further ordered, adjudged and decreed that said deeds be set aside and canceled and held for naught, and that the plaintiff, Jerusha Crab, was and is decreed to be the owner of an undivided one-third interest in the said property, described as follows, to wit:

> The west half of the southeast quarter, and the southeast quarter of the southwest quarter of section 32, and the south half of section 30, all in township 5 N., range 35 east, W. M.,

and that she recover immediate possession or her said undivided [100] one-third interest therein, and that the defendants and each of them be forever

restrained and enjoined from setting up or claiming any estate, right, title, or interest under said deeds as to the said undivided one-third interest of said Jerusha Crab, and

It is further ORDERED, CONSIDERED, ADJUDGED and DECREED that in case the said plaintiffs and defendants cannot agree among themselves as to a division of said property and a partition of the same, that the said plaintiffs have leave to apply to this Court for the appointment of a commission to partition said property and divide the same and for the setting off of the said plaintiff, Jerusha Crab's one-third interest therein and for the sale of said property if the same cannot be so partitioned and divided.

And it is further ORDERED, ADJUDGED AND CONSIDERED that since the said defendants have taken possession of said lands under said deeds they have received from said lands the sum of $9,137,25 for the years 1914 and 1915, of which sum Jerusha Crab is entitled to one-ninth, amounting to $1,015.25, and in addition thereto she is entitled to and should recover a one-ninth interest of the amounts received from the crops for the year 1917, but from these sums so due her should be subtracted the taxes paid by the defendants upon said property during the time the same has been in their possession, as aforesaid.

And it is further ORDERED and DECREED that (in case the parties do not agree upon said sums within thirty days from the entering of this decree) that this cause be *referred Robert* F. Maguire, Mas-

ter in Chancery of this court, to take testimony and ascertain the receipts of rents and profits for the year 1917, and the amount of taxes paid by the defendants [101] on the land in question.

And it is further ORDERED, ADJUDGED and DECREED that the plaintiffs have and recover their costs and disbursements made and expended herein taxed at $379.85, and that execution issue therefore.

Dated this 15th day of April, 1918.

CHAS. E. WOLVERTON,
U. S. District Judge.

Filed April 15, 1918. G. H. Marsh, Clerk U. S. District Court for Oregon. [102]

And afterwards, to wit, on the 24th day of May, 1918, there was duly filed in said court a petition for appeal, with allowance of appeal thereon, in words and figures as follows, to wit: [103]

In the District Court of the United States for the District of Oregon.

JERUSHA CRAB and JOHN CRAB, Husband and Wife,

Plaintiffs,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS and VERNITA WATTS,

Defendants.

Petition for Appeal and Order Granting Same.

Filed this 24th day of May, 1918, in the District Court of the United States for the District of Oregon.

To the Honorable CHARLES E. WOLVERTON, District Judge of the Above-entitled District:

The above-named defendants, feeling themselves aggrieved by the decree made and entered in this cause on the 15th of April, A. D. 1918, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignments of Error which are filed herewith, and they pray that this appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, in the State of California.

And your petitioners further pray that the proper order touching the security to be required of them to file their appeal shall be made, and further desiring to supersede the execution of the decree, the petitioners here tender bond in such amount as the Court may require for such purpose, and pray that with the allowance of the appeal a supersedeas be issued.

JAMES H. RALEY and
WILL M. PETERSON,
Attorneys for Appellants. [104]

The foregoing petition is granted and the appeal allowed upon giving a bond conditioned as required

by law, in the sum of Ten Thousand Five Hundred Dollars.

CHAS. E. WOLVERTON,
District Judge for the District of Oregon.

Filed May 24, 1918. G. H. Marsh, Clerk. **[105]**

And afterwards, to wit, on the 24th day of May, 1918, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: **[106]**

In the District Court of the United States for the District of Oregon.

JERUSHA CRAB and JOHN CRAB, Husband and Wife,

Plaintiffs,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS and VERNITA WATTS,

Defendants.

Assignments of Error.

Now, on this 24th day of May, A. D. 1918, come the defendants, and through their counsel and attorneys, James H. Raley and William M. Peterson, and say that the decree entered in the above-entitled cause on the 15th day of April, 1918, is erroneous and unjust to the defendants; and as assignments of error insist:

First. The Court erred in refusing to grant the

motion of the defendants "For an order to dismiss the bill of *of* the plaintiffs upon the grounds that they have not offered any evidence sufficient to overcome or even to balance the answer which they have called for in this case under oath, and which have been sworn to, and are responsive in every manner to the allegations of the complaint"; which said motion was interposed by the defendants at the conclusion of the testimony introduced by the plaintiffs in chief. The record discloses that the defendants were required to answer under oath, which they did. Defendants contend that since the plaintiffs sought a discovery, requiring the defendants to answer under oath, they are bound by the old rule that the sworn statements by the defendant in direct response to an allegation in the bill is deemed to be true, unless contradicted by two witnesses, or a single witness and corroborating circumstances. Defendants insist that at the time their motion was interposed there was no evidence whatever in support of the material allegation of the bill and that regardless of the motion, plaintiff's complaint should have been dismissed for lack of proof. **[107]**

Second. The Court was in error in finding and decreeing in the decree that Thomas J. Watts was the owner at the time of his death of the following described lands in Umatilla County, State of Oregon:

> The west half of the southeast quarter and the southeast quarter of the southwest quarter of section 32, in township five (5) north, range 35, E., W. M.

Third. The Court was in error in finding and decreeing that for a considerable time prior to his death the said Thomas J. Watts was "feeble in mind and mentally weak and easily influenced," and "that Homer I. Watts and Marvel Watts procured from said Thomas J. Watts a deed" for the said property.

Fourth. The Court was in error in finding and decreeing in the decree that the deeds were without valuable consideration and were secured by fraud and deception and undue influence and that they were not the voluntary and intelligent act of Thomas J. Watts and that they are fraudulent and void and of no effect.

Fifth. The Court was in error in finding and decreeing in said decree that Jerusha Crab is the owner in equity by virtue of inheritance of an undivided one-third interest in said real property.

Sixth. The Court was in error in finding and decreeing in said decree that Jennie Anderson Watts and Vernita Watts are seeking to take advantage of any action of Marvel Watts and Homer Watts.

Seventh. The Court was in error in the decree in decreeing that the deeds be set aside and canceled.

Eighth. And the Court was in error in finding and decreeing that Jerusha Crab is entitled to recover a one-ninth interest of the amount received from the crops of the said lands for the year 1917.

WHEREFORE the defendants pray that the Court of Appeals [108] shall reverse said decree

and render a proper decree on the record therein.

JAMES H. RALEY and
WILL M. PETERSON,
Attorneys and Solicitors for Defendants.

Filed May 24, 1918. G. H. Marsh, Clerk. [109]

And afterwards, to wit, on the 31st day of May, 1918, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit: [110]

In the District Court of the United States for the District of Oregon.

Case No. 7340—IN EQUITY.

JERUSHA CRAB and JOHN CRAB, Husband and Wife,

Plaintiffs,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS and VERNITA WATTS,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, Homer I. Watts and Marvel Watts, as principals, and F. S. Le Grow and W. R. Taylor, as sureties, acknowledge ourselves to be jointly indebted to Jerusha Crab and John Crab, husband and wife, appellees in the above cause, in the sum of Ten Thousand Five Hundred ($10,500.) Dollars, conditioned that

WHEREAS on the 15th day of April, A. D. 1918,

in the District Court of the United States for the District of Oregon, in the suit depending in that Court wherein Jerusha Crab and John Crab, husband and wife, were plaintiffs, and Homer I. Watts, Marvel Watts, Jennie Anderson Watts and Vernita Watts were defendants, numbered on the Equity Docket as 7340, a decree was rendered against the said Homer I. Watts, Marvel Watts, Jennie Anderson Watts and Vernita Watts, and the said defendant having obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and filed a copy thereof in the office of the Clerk of the Court, to reverse the said decree, and a citation directed to the said Jerusha Crab and John Crab, husband and wife, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be [111] holden in the city of San Francisco, in the State of California, on the —— day of ———, A. D. 1918:

NOW, if the said Homer I. Watts, Marvel Watts, Jennie Anderson Watts and Vernita Watts shall prosecute their appeal to effect and answer all demands and costs if they fail to make their plea good, then the above obligations to be void; else to remain in full force and virtue.

HOMER I. WATTS,
Principal.
MARVEL WATTS,
Principal.
F. S. LE GROW,
Surety.
W. R. TAYLOR,
Surety.

Approved this 31st day of May, 1918.

CHAS. E. WOLVERTON,

Judge of the United States District Court of Oregon. [112]

In the District Court of the United States for the District of Oregon.

JERUSHA CRAB and JOHN CRAB, Husband and Wife,

Plaintiffs,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS and VERNITA WATTS,

Defendants.

Verification of Sureties on Bond on Appeal.

State of Oregon,
County of Umatilla,—ss.

I, F. S. Le Grow and I, W. R. Taylor, after being first duly sworn, each for himself and not for the other say that I am a resident and inhabitant of Umatilla County, State of Oregon, a freeholder therein; that I am worth the sum of Ten Thousand Five Hundred ($10,500) Dollars over and above all my debts, liabilities and property exempt from execution, and I hereby acknowledge myself as surety upon the bond on appeal in the case of Jerusha Crab and John Crab, Husband and Wife, Plaintiffs, vs. Homer I. Watts, Marvel Watts, Jennie Anderson Watts, and Vernita Watts, Defendants, in the Dis-

trict Court of the United States for the District of Oregon, for all uses and purposes regarding the said Bond on Appeal.

F. S. LE GROW.
W. R. TAYLOR.

Subscribed and sworn to before me on this 28th day of May, A. D. 1918.

[Seal] JENNIE G. WATTS,
Notary Public for Oregon.

My commission expires October 4, 1920.

Filed May 31, 1918. G. H. Marsh, Clerk. **[113]**

And afterwards, to wit, on the 20th day of July, 1918, there was duly filed in said court a statement of the evidence, in words and figures as follows, to wit: **[114]**

In the District Court of the United States for the District of Oregon.

JERUSHA CRABB and JOHN CRABB,
Plaintiffs,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS and VERNITA WATTS,
Defendants.

Statement of Evidence.

The defendants and appellants, in compliance with Rule 75, prepared and submitted a statement of the evidence in this cause, in simple, condensed and nar-

rative form; but, thereafter the plaintiffs filed objections thereto and offered amendments. Whereupon the defendants and appellants, having no objections to the amendments offered, have prepared another statement of the evidence in which they have included all of the amendments offered by the plaintiffs, and now therefore submit narrative statement as follows:

Testimony of William David Parker, for Plaintiffs.

WILLIAM DAVID PARKER, first witness called by plaintiffs and appellee, testified that he resides close to St. John, Whitman County, Washington; owns a farm there and is acquainted with the plaintiffs and lives about a half mile from them; that he "knew Thomas J. Watts"; thinks he became acquainted with him in 1878; "before I went up to St. John I had lived" near Athena, Umatilla County, Oregon; Athena, at that time, being called Centerville; that he was "pretty well acquainted with Watts —lived neighbor to him part of the time and later boarded with him" two different times and that they used to assist each other in the farming business and were friends; that he saw Watts at the home of the plaintiffs near St. John, Washington, about the 24th day of March, 1914, "he was there when I moved back from Spokane," and saw him most every day while Watts was there; that Watts appeared to be feeble; **[115]** was worse at times "afterwards" and then at other times about like he was when he first saw him "there"; that he knows Watts, talked to him a couple of times about his property affairs;

(Testimony of William David Parker.)
"the way he came to be talking was he" asked him to write to Fay Le Grow of Athena, Oregon, for a will Watts had there, stating that his hands were in such a shape that he couldn't write and wanted witness to get the will; "that was the first time"; witness wrote the next morning. Watts told him afterwards he got the will and said to him regarding it, "I put it in there, and that is done," pointing at the stove when he said it. That when Watts first talked to him about the will he said: "I have made a will, and I am not satisfied," and further stated that he wanted his daughter Jerusha Crabb to have her share of the property, as she was his child the same as the boys were. That at the time Watts went away from the home of Crabbs, witness, Mr. and Mrs. Crabb, and the daughter, Viola, Marvel Watts and Dr. McIntyre were there, and that Watts didn't talk as though he wanted to go away from the home of Crabbs, and said, "Marvel has come after me and I guess I will have to go." Watts was in bed at the home of John Crabb, but was taken away in an automobile. That they did not want him to take him away. Marvel Watts said, "I have come after him, and I am going to take him." That they got him out of bed and carried him to the automobile. That Mrs. Crabb, Dr. McIntyre and Marvel Watts went with Watts from the home of the Crabbs to the train. That Watts and Jerusha Crabb appeared to be friendly in every way; that Watts came to the home of the witness about seven years ago, stayed with witness and witness took him over to the home of

(Testimony of William David Parker.)

Crabbs and he and they appeared to be very friendly in every way. Witness never heard Watts say a word against Jerusha Crabb in any way, but witness never heard Watts say he was "attached to her." [116]

Upon cross-examination, this witness stated that he saw Watts two or three different times after 1903, up about St. John when Watts would be there on a visit; saw him the last of March and fore part of April, 1914.

Witness moved to Spokane in the fall of the year 1912, and came back to St. John about the 24th day of March, 1914, and saw Watts at the home of the Crabbs the next morning, the 25th of March, talked about affairs generally with him, went to see him nearly every day except two. Witness had a cold and didn't feel right while Watts was at Crabbs and cannot remember whether it was a week or not after he saw Watts on the 25th of March until Watts asked him to write for the will. That Mr. Crabb told witness the day before he wrote for the will that Watts wanted to see witness and that witness, next morning, while he was on his way to the depot to bring back some "stuff" stopped at the home of Crabbs and wrote the letter for the will; that Watts told him he had a will at Fay Le Grow's—the bank at Athena—was not satisfied with it, wanted witness to write to Fay, as his (Watts) hands were in shape he couldn't write; that Watts talked to him in an intelligent manner, remembered where his will was, the place he had left it, the name of Le Grow, said he was not

(Testimony of William David Parker.)

satisfied with it, but did not say anything about the contents of it at all; and witness wrote the letter for the will the next morning. Watts said to witness, "Fay knows you and he will send it to you." Witness further said, "And I just wrote to Fay and told him Mr. Watts said he had a will there, and that his hands were in such condition he couldn't write; and I asked him—he asked me to write—and I wanted him to send it to St. John in care of John Crabb." Witness identified the letter marked Defendants' Exhibit "A" for identification. Witness [117] does not remember how long it was after he wrote the letter until he saw Watts again, but when he saw Watts, Watts told him he had got the will, pointed to the stove, and said he put it in the stove and that was done. Witness never saw the will, never tried to find out anything about it in any way, and Watts did not tell him what was in the will. He understood Watts to say that he wanted Mrs. Crabb to burn the will, and that she wouldn't do it, and that he (Watts) put it in the stove. Watts told him, at the time he asked him to write for the will, that he was not satisfied with it; that she (Jerusha) was his child the same as the boys and he wanted her to have part of his property. "His conversation would lead a person to believe that was the reason he was not satisfied with the will." That on the day when Watts was taken away from the home of Crabbs, Marvel Watts told witness he had come to get him (Watts) and appeared to be dissatisfied with the way he was being taken care of; that witness helped to dress Watts

and take him out of bed that morning.

"What was his condition when you took him out of bed?

A. Well, he was in a feeble condition.

Q. What was the condition of his clothing and the bed—was it clean?

A. Well, now, I don't know that I could say just exactly what it was.

Q. Was it clean—was he in a clean bed and was the clothing he had on clean?

A. Well, his clothing—we changed the clothing he had on.

Q. Wasn't the bed and the clothing he had on in a foul condition—and wasn't he lying there in a foul condition at the time Marvel took him away? **[118]**

A. Well, now, I didn't notice that it was particularly foul—anything of the kind, sir.

Q. Do you remember making some remark about it and stepping to the door to get a breath of fresh air? A. No, sir.

Q. You don't remember that? A. No, sir."

That Watts knew him when he was there that morning, but he never saw Watts alive any more.

On redirect examination that witness said that the Crabb house was a fair house but that he did not notice anything unusual about the bed Watts was in—didn't notice the bedclothes being dirty or anything of that kind or being particularly clean. And witness further said: "I was not in very good shape at the time. I was suffering with a cold, like I am now. I might have not been able, if they had not smelled

(Testimony of William David Parker.)
just right or anything, to detect it''; that he had a very severe cold, did not notice anything wrong about the bed; that Marvel Watts claimed at the time to notice something was wrong and said, ''He stinks,'' but witness wasn't there to look for anything of the kind and did not notice anything of the kind; that witness is in his 74th year and knows that Watts was past eighty; that when the defendants, Homer Watts and Marvel Watts, were boys, witness was a neighbor to them, but at that time he did not know Mr. and Mrs. Crabb at all; that ''These boys were raised up with me; they was raised right up there by me, you might say. I had more acquaintance with them than I did with Mr. and Mrs. Crabb.'' **[119]**

On recross-examination he stated that he moved up to the Athena country in the fall of the year 1878, and stayed there until 1889 or 1890, when he moved into Athena, but while living out on the farm he lived near Mr. Watts, but never saw Jerusha about his home there near Athena at any time, but heard the boy's mother say she was there.

Testimony of Dr. Douglas McIntyre, for Plaintiffs.

Dr. DOUGLAS McINTYRE, a graduate of Georgetown Medical School, Washington, D. C., who had been practicing medicine at St. John, Washington, about twelve years, acquainted with Mr. and Mrs. Crabb, stated that he knew Watts just ''for a very short interval''; was first called to treat Watts the 3d day of April, 1914, and continued to wait upon

(Testimony of Dr. Douglas McIntyre.)

him until the 11th day of April, 1914, at which time Watts was at the home of John Crabb about eight miles east of St. John; that Watts was getting about the usual care there that a man gets at a ranch house; that the Crabbs have a good, comfortable new house and Watts had a good, comfortable room, was on a lounge the first day he saw him but after that he was in bed; that the bed "was fairly clean; that an old man with prostate gland nearly always has a little residual urine—strong smelling urine"; that Watts had "retention of urine" and enlarged prostate gland and it was rather hard to get an instrument into his bladder and to some extent, a slight lack of control of urine after the instrument was put into his bladder; that Watts was a very old man, a very feeble man, "feeble for his age," and was in intense pain when he first saw him on the lounge, was restless; that he never saw him up or down except he was helped; that he was there the day Watts was loaded into an automobile [120] and taken to the train.

"Q. What did you think at that time as to his being in a condition to be removed?

A. Well, he was not in a very good condition to move.

Q. Did you approve in any way of his removal?

A. Well, I approved of it to this extent, if I remember correctly, that Mr. Watts said—Marvel Watts explained to me that he could get a great deal better care, better nursing and better surroundings, perhaps, in every way than he had there; and that

(Testimony of Dr. Douglas McIntyre.)
was about the extent, I guess, of my approval of his being moved." That he figured Watts was about on his last legs anyway and had not talked with him about being moved and does not recall knowing how Watts felt about being moved. "I was leaving that up to Marvel Watts," but didn't think he was in "especially good physically condition to be moved," doesn't recall telling Marvel Watts that he approved of the removal; that he did not think Watts would live long and told Marvel Watts and the Crabbs so; that Watts was carried out to the automobile. "I don't think he walked at all." "I am quite positive he did not walk into the train." That Watts was on a cot in the baggage car or express car, and that witness, Marvel Watts and Watts were together in the car from St. John to Athena; that he could not see much difference in the condition of Watts at the time of leaving St. John and the time of getting into Athena; "I didn't think he talked quite as much as he did before"; didn't make much noise; that day was the 11th day of April Watts was brought to Athena from St. John; witness saw him the next morning, 12th of April, but did not talk to him as he didn't ascertain [121] whether he was asleep or awake. "When I first saw him (at the home of Crabbs) I took it to be a case of sciatica, that he had trouble with the sciatic nerve, and complained of pain down the back of his leg—I believe it was the right leg, and I presume that that had a good deal to do with this retention of urine that followed; and he was about like an extremely old man after suffer-

(Testimony of Dr. Douglas McIntyre.)

ing intense pain and loss of rest." "His mental faculties, of course, were not—I did not figure they were clear, except one time. I was out there one day—just what day I forgot, but it was after we had to draw that urine, I guess—that he talked I thought rather pleasantly about things that were past." "He didn't talk much about the present."

"Q. Now, what do you say, Doctor, as to whether or not during any of that time that you treated him, whether in your judgment he was in such condition as to be able to intelligently manage his affairs or make an intelligent distribution of his property"? (Page 30.)

Q. I don't believe, if he had been left to his own initiative, that he could have very well planned out anything that was at all complicated at any rate; that he didn't see a great deal of promise for Watts either physically or mentally; that, as he recalls it, he gave him something to increase the flow of urine and believes he gave him a little tonic doses of strychine; that strychine is a heart stimulant; that on the train Watts did very little talking; that, as he recalls it, Mrs. Crabb didn't want Watts taken away; that he thinks Homer Watts met them. [122]

On cross-examination he stated that he doesn't recall Marvel Watts being at the Crabb home when he first saw Watts, but saw Marvel there afterwards; that he saw Watts five or six times at Crabbs, stayed with him about two hours the first day and perhaps an hour at each of the other times; that he

(Testimony of Dr. Douglas McIntyre.)

called Dr. Mitchell to assist him in treating Watts sometime between the 3d and the 8th and they had considerable difficulty in getting the instrument into the bladder; that he doesn't recall passing the catheter but once; that it must have been about the 5th or 6th that Watts talked to him something about living around Athena. "I believe I asked him questions. I did test his memory a little, I think, at that time. I found he had a much better memory for things past some time than he did for the present. I think perhaps I asked him how he enjoyed his trip to California and I thought he answered intelligently." That he asked Watts about things which happened after he was sick and he could not recall definitely; that he never talked to him about business and doesn't remember hearing him say anything about his property; that he carried on a conversation with him probably twenty minutes one day; that he remembers asking him about his condition, and, as he remembers it, Watts answered him a time or two that he thought he was better; that perhaps Watts was asleep when he saw him the next morning after bringing him to Athena but he does not think he spoke to him, does not know whether he was asleep or not. He had acted that way before. He acted a good deal the same on the train coming down. You might go around him and you wouldn't know whether he was asleep or not. "My presumption was that he was asleep." That after bringing **[123]** him to Athena he presumed another physician would take charge of him; that

there was no nurse with him except Mr. and Mrs. Crabb while he was at the Crabb home.

Testimony of Clarence E. Skelton, for Plaintiffs.

CLARENCE E. SKELTON, of Spokane, Washington, stated that he resided, 1912 and 1913, near Kennewick, Washington, and that Watts lived with him in his family at that time—from a month to six weeks or two months or longer in 1912, and was there again in 1913, a month or more in the fall; got sick and went to California, got letters from him from California.

"Q. Now, during the time he was there during those years did you ever hear him talk about his property or what he was going to do with it?

A. Well, I heard him speak about his property quite often. He was a man that repeated things a good deal, and I heard him speak of it quite often.

Q. Now, just state to the Court, what, if anything, he said in relation to what he was going to do with his property.

A. Well, he frequently mentioned that he wanted his children to share alike in his property, from the way I understood him all the time.

Q. What children would he mention at this time?

A. He would mention Homer, Marvel and Jerusha. He spoke a good deal of Jerusha, his daughter, the only daughter he had, as I understood it.

Q. Do you know what his feelings toward Jerusha was?

A. It always seemed to be the very best from the way he spoke of her.

(Testimony of Clarence E. Skelton.)

Q. Can you tell the Court what he said about her?

A. Well, he used to talk about her quite often, about making [124] his home there a good deal, and he would correspond with her, and he used to look for letters from her quite often when he was with me, and he used to tell me when he was talking about his property that he expected them to share alike in it." That Watts told him a good deal of his family affairs and spoke very highly of his first wife, but that he didn't speak kindly of his second wife—called her a she-devil.

On cross-examination he stated that he was not acquainted with Mr. and Mrs. Crabb at the time he first became acquainted with Watts and was not acquainted with them until he met them at the trial and that he lives about two hundred miles from them; that he first got acquainted with Mr. Watts in Spokane in 1903 or 1904; that Watts came to his home at Kennewick about 1912 to take electric treatments; that he has an electric robe and used to give Watts treatments with it; that he is not a physician but gave Watts treatments and that Watts boarded with him; when he left in 1912 he said he was going to California; that he got letters from him pretty often from California, but does not remember of getting any in 1912 but remembers getting one in 1913 and thinks he got one in January, 1914; that he thinks in August, 1913, Watts was ill at his house and a doctor from Kennewick was called to see him; that Watts told him he had a ranch at Athena and that the boys had it rented and were pay-

(Testimony of Clarence E. Skelton.)

ing him one-third rental; that Watts talked to him about his second wife, and used to sit and cry about her and tell him he had given his second wife some land, and a house and lot in Athena, and further told him he wanted the balance of his property to go to his three children. [125]

"And in all these conversations he would say he wanted them to share alike?

A. Well, sometimes he might not and other times he would. He spoke of his daughter Jerusha a great many times, how she cared for him, and he seemed to think an awful lot of her.

Q. What did he say that caused you to think he thought an awful lot of her?

A. Well, he used to say he would go there when it was disagreeable for him other places, and she always treated him well, and he would always write —I know he used to write when he was at my place, and he received letters from her quite often." (Page 54.)

That to the best of his recollection he never saw Watts after September or October, 1913; that Watts, as he remembered it, never spoke of his will but did tell him he wanted his childen to share alike in his property; that while Watts was at his place he received letters from Jerusha and wrote letters to her; that Watts took several treatments for rheumatism with witness in his private home at Spokane about eighteen months after he had taken the first treatments, and after took treatments with him after he took a hotel in Spokane; that the rela-

(Testimony of Clarence E. Skelton.)

tions between him and Watts were very friendly and Watts confided in him a great deal and told him he felt more at home at his place than any place away from hime; that there was trouble between them one time and that Watts "came to me and begged me to forget the past and take him in and treat him—cried like a baby—and I told him I would, and I did so, and we buried the past," and that after that for six or eight years they were very [126] friendly, and that he used to come to his place every year and stay from one and two months at a time.

On recross-examination he testified that Watts took the first treatment with him, as he remembers it, in 1903 or 1904, and that Watts and the trouble over his (witness') wife was about that time and he settled with Watts for $250.00 which was given to the wife of witness who went east on it and was gone eighteen months and wrote witness a number of letters asking him to take her back, but it was eighteen months before they lived together again.

Testimony of Viola Etta Wheeler, for Plaintiffs.

VIOLA ETTA WHEELER, daughter of plaintiffs, twenty-two years old, married, testified that Watts, her grand-father, came to the home of her parents, plaintiffs, about the middle of March, 1914, and remained about twenty-five days, was not able to walk without help when he came and got worse in about two weeks so that he was not able to walk even with help; was put to bed; that the home of her

(Testimony of Viola Etta Wheeler.)

parents is a good comfortable home of seven rooms; that he had the bedroom downstairs, where her father and mother used to sleep, and her father slept in the same room to take care of him; that her father and mother waited on him and gave him as good care as he could have had without a trained nurse; that the blankets on the bed where Watts slept were changed every day and washed and the bed was comfortable; that shortly after he came there he asked her mama to write for the will but she refused to do so and he then asked Mr. Parker to write for it, as Parker and he were old acquaintances and good friends; the will came in a large envelope addressed to Watts, and when it came Watts signed a receipt for it which was returned and the will was put away by Watts, who [127] afterward burned it. After it was put away, he asked for it, her mother gave it to him, he opened it and read it and asked her mother to burn it but she would not do so and Watts said he would have Mr. Parker to burn it, and "I told him if he wanted to burn it to burn it himself and I opened the stove and helped him up and he burned it," and said, "Now, it is done and they will all share equal." That two or three days thereafter Marvel Watts, his wife and daughter and mother came to the home of her father at which time Watts "Was not exactly in his right mind and was not able to set up"; that Marvel Watts came on Friday evening and stayed until Monday, went away, came back in about a week to take grandpa home; that her parents did not want him taken away, but

(Testimony of Viola Etta Wheeler.)
Marvel said he had come after him and was going to take him, and that her grandpa did not want to go at first and said if Marvel had come to take him home to sign papers he would not go; but Marvel said he didn't intend to take him home to sign papers at all; and grandpa said he had burned the will and wanted them all to share equal; that on the morning Watts left he called her folks into the room and said, "Now, on my word and honor there will be no papers made and the property will be divided equal"—he said this to my father and to my mother; that Dr. McIntyre, her mother and Marvel Watts took Watts from the home of her parents to the train; that they carried him out to the car, that he had not been able to get up by himself since the first time Marvel was there, and had only been up once at all, and then for only twenty minutes. (Page 69.) [128]

On cross-examination she testified that she was in an adjoining room and heard Watts say to her papa and mama, "On my word and honor the property will be divided equal"; that she heard him tell Marvel he would not sign any papers, and if Marvel was taking him away to sign papers he would not go as he wanted the property to be divided "equal," and Marvel said to him, "It will be as you want it." This was the second time Marvel was there, and the next morning after he came. He came in the evening about five o'clock, and they left between eight and ten next morning; that she never heard her father or mother say anything to Watts about how the prop-

(Testimony of Viola Etta Wheeler.)

erty should be divided; that Watts talked about his property every day and always said he wanted it divided equal. She heard him tell Parker he had a will in the bank in Athena and wanted it, was not able to write himself and wanted Parker to write for it, and the will came two or three days or a week after Parker wrote the letter, and she got it from the mail-carrier and took it in the dining-room to her grandfather, who was sitting up at the time. He opened the envelope, took out the will, which was in another envelope, and asked her mother to put it away. Several days thereafter he asked for the will and her mama gave it to him and he opened it, read it, but she (witness) did not read it and does not know what it contained. He asked her mama to put it in the fire and she said she would not do it. When her mother refused to burn the will he said he would have Mr. Parker to burn it. "I told him if he wanted it burned to burn it himself; I opened the stove and helped him up and he put it in," and he said, "Now, it is done and the [129] property will be divided equal." She did not hear him mention property or wills or deeds at any time after that until Marvel came there when she overheard some conversation regarding property; that she never has talked this matter over since its occurrence with her father and mother and never told them what she was going to testify to about overhearing those conversations—never told anybody but Judge Bennett.

(Testimony of Viola Etta Wheeler.)

On redirect examination she said that Watts was at the home of her parents two or three times a year during the last six years before he died and would stay there a week to a month and that he always treated her mama as though he thought a good deal of her; that his mind always seems to dwell more or less on his property and he talked about the way he thought it ought to go and acted as though he thought her mama ought to share equal with the boys; that he always spoke in a very loud tone but that he was deaf.

On recross-examination she said that she had never heard him mention a will until he asked her mother to write for it; that her mother did not read the will and as far as she knows neither she nor herself knew what was in the will and that if her mother ever read it she never knew it.

Testimony of Jerusha Crabb, in Her Own Behalf.

JERUSHA CRABB, one of the plaintiffs, testified that she would be 54 years old the 25th day of May; was born in Linn County, Oregon; that the defendants, Homer I. Watts and Marvel Watts, are her half-brothers; that her mother died when she was about two years old and that she was raised by her uncle, Marvel Watts, with the exception of about the first two years of her life and another period of about [130] three years; that when she was two she went to her uncle's and stayed about a year, and then was with her father for three years until she was six years old; that her sister died at about

(Testimony of Jerusha Crabb.)

the age of fifteen years; that her father went back to Missouri and married his second wife and lived in Umatilla County while she herself lived with her said uncle, Marvel Watts, in Washington County, Oregon; that when she married Mr. Crabb she went to Dayton in Eastern Washington, lived there about a year and a half, then moved to near Heppner, Oregon, for two and one-half years, and then moved to Whitman County, Washington, where they now live; that while she lived with her uncle, Marvel Watts, she visited with her father one time only, and that was when she was nine or ten years old, and for a period of about six weeks; that right after she was married she visited with her father about a week and about a year and a half after that visited him again about one day and thereafter the next summer her father visited her for a day or two; that about twenty-three years ago she visited with him about a week, and again in June, and again later when the second boy died; that after her father and his second wife were separated about nine years ago he visited her a great deal more but she didn't go down to his place to see him, and the last three years before he died he visited with her a great deal, and wrote letters to her regularly, writing to her every week the last two years, had a very hard sick spell at her home about six years ago, stayed at her house three or four weeks, and then went up to Skelton's and stayed a month and came back the fore part of December; that she nursed him through [131] the sick spell. "Then I disremember exactly how many

(Testimony of Jerusha Crabb.)

times. Every time he went to Spokane or came back, he come by and stopped, and stayed from a week to three weeks, and I disremember just how much he came until the spring of 1912 he came there and he stayed quite a while. I won't say how long. Then we went up to Mr. Skelton's and stayed and doctored a while, then he came back and stayed with me until about the first of October. Then he went down home and went to California—I think he spent the winter of 1911 in California, and he spent the winter of 1912 there," and wrote her that he was coming back to spend the summer that he went to Kennewick in the summer of 1913 at Skelton's place and wrote to her in August that he was sick and was going back to Athena and then going to stay with her through the winter or go to California that the next letter she got from him he had only stayed at Athena a short time and went to California where he spent the winter, was taken sick, and that she got a letter from him every week while he was in California and that in every letter he told her he was getting feebler, went there for his health but it was doing him no good and that he wrote to her he was getting worse and told her in the latter part of February, "I want to stay here till the 15th of March if I can, but I am sick"; that there were just a few words in each letter; that he wrote to her that if he did not get able to come by the 15th of March some of them would have to come after him and that a few days later she got a letter from Thomas Page stating her father was very much worse and that

(Testimony of Jerusha Crabb.)

"We would have to come and get him." That after he was divorced he didn't live continuously in any one place, he spent two [132] winters in California and one in Willamette Valley, but the first year after he was divorced he stayed with Homer Watts most of the year and after that when he was at Athena he made his home with Marvel Watts, and when at Spokane and Kennewick he made his home with Mr. Skelton, but she does not remember how much of the time he visited with her; that her father was not at her home at all during the year 1913, the year before he died; that he left in the fall of the year 1912, went to California, came back to Athena in the spring of 1913, wrote her several letters from Kennewick, went back to California again in the fall. When she got the letter from him from California saying that some of them would have to come to get him, she wrote a letter to her brother, Marvel Watts, and told him their father was very poorly and some of them would have to go after him, and Marvel told her he would go. This was the last of February or the first of March, and her father was brought to her home by Marvel the 17th of March, having been at Athena a few days before that. His health was very feeble then; he was not able to walk without support, and gradually grew weaker all the time he was there and she used hot water bottles, liniment and bathed his limbs with alcohol when he had bad spells and pains; that Marvel, his wife, little girl and her stepmother came about four o'clock the 3d of April at which time her

(Testimony of Jerusha Crabb.)
father was "entirely unconscious," partly, she supposes, from the effect of medicine and partly from disease; that Marvel hadn't been there after he brought father until the third of April (page 93); that Marvel remained until the next Monday morning but her stepmother left on Sunday morning; that she does not think her father [133] recognized any of them while Marvel was there, but on Wednesday he got so he could recognize people and talked to her and asked her about them being there, thought Homer had been there but he had not; that he was not able to get out of bed without help from the 3d of April until he was taken away on the 11th of April, but on Wednesday afternoon appeared brighter and asked her to help him up and she sat him out on a chair for fifteen or twenty minutes, and he said to her, "Isn't this the longest afternoon you ever saw?" and he said he was "awfully tired," and she put him back to bed. In answer to the question, "Now, knowing your father as you did, having been around with him as you have, and being there with him, what do you say, in your judgment, as to whether or not between the 3d day of April when he took this bad spell and the time he went away from your place, he was ever in condition so that he could do intelligent business?" she said, "Oh, no, no." That she did not know, prior to March, 1914, that her father had made a will. He told her the next day after he came about his will, talked about his property a great deal almost every day; told her he had made a will and wanted her to send and get

(Testimony of Jerusha Crabb.)
it as it didn't suit him, wasn't what he wanted, had Mr. Parker, a near neighbor and old friend of his write for the will. The will came, was brought into the house by her daughter Viola, the outside envelope torn open by him, signed and dated a slip of paper in his own handwriting for the will, could sign his name easily, used his right hand, used a pen, handed the will to her to put away which she did, asked her one morning thereafter to get the will, saying that it worried him. "I cannot say just exactly how **[134]** many days after he got it. He woke up one morning and called me to him and asked me if I would not get the will. 'He said it worrier him that night.' I says, 'Oh, well, wait till after breakfast, Pap,' and I took him up and dressed him and brought him to the fire, and he asked me then, he says, 'Where is that will?' and I says, 'I will go and get it.'" She got it; he tore it open and read it and she stood behind his chair saw every word that was in it but her daughter did not know that she did so, as she stood a few steps away from him and the will was in "very large print handwrite and I could read it all." It gave Homer and Marvel equal shares and made them both administrators and gave her $200. He asked her to burn it; she refused, and he said he would have Bill Parker to burn it. Viola was standing at the table and said, "Well, Grandpa, burn it yourself. I will open the stove"; Viola took the stove lid off and lifted him up and he burned it and said, "Now, it is done," with a laugh saying, "You shall have your share equal"; that the

(Testimony of Jerusha Crabb.)
property seemed to be on his mind continually and that if he ever mentioned the will he cried until she had to pacify him to keep him from crying so hard and that he told her he did not want to make the will in the first place but that "they made him do it or rather forced him to do it." That when Marvel came there to take him away she did not want him to go as he was too feeble, but Marvel said he had come after him and was going to take him, saying the doctor thought it would be best, but that her father said, "Marvel, if you have come after me to take me down to make any papers, or sign any papers, I won't go ary step," and that Marvel said **[135]** "Father, we have no such intention as that; it shall be divided equal; I won't influence you to sign anything," or words to that effect; that thereafter he asked Marvel if he would see that the property was divided equal between the three children—Marvel, Homer and herself—and that Marvel said, "Father, what makes you worry about it"? "I will do the thing just right"; that then her father called for her and told her that he wanted her, Homer and Marvel to have the property equal and that she said, "All right, Pap"; that then he called for her husband, took him by the hand and said, "John, you and Jerusha has been so kind to me, on my word and honor, I want Jerusha to have her one-third of the property and I want it divided equal"; that after her father was taken from her home to the train she had a talk with Marvel about the property in which he said, "Now, Jerusha, don't worry anything about

(Testimony of Jerusha Crabb.)

the property; there has been family trouble enough and we will divide it equal and have peace now"; that while her father was at her home she and her husband gave him the best care they possibly could, kept him in the best bed they had, with new quilts, a new blanket and put clean blankets on the bed every day and kept the bed clean, but that her father could not help but soil the bed from the time he took sick, as he was in so much misery that he could not help himself, but that she kept him clean, changing his bed every day, giving him the best care that she could give him without a trained nurse and that Marvel objected to her getting a trained nurse, telling her he had a nurse already employed and that it would be better to take him home, but she objected to his being taken away as she thought he was not able to go. That she was never on the witness-stand **[136]** before in her life.

On cross-examination she testified that her father came to her home in the spring of 1912, went to Spokane, returned to her home and was there altogether in the year 1912, two and one-half months, left for Althena about the first of October and then went to California; but that she does not think she saw him or that he was at her home at all in the year 1913, nor in the year 1914 until about the 17th day of March when he came to her home with Marvel, and that she did not know he was coming then until Marvel sent her word that they were coming; that Marvel came with him to her home on the 17th and left on the 18th of March. That the same day Mar-

(Testimony of Jerusha Crabb.)

vel left her father talked to her about his property, but she did not know he had a will until he told her, saying, "Jerusha, I have got a will and I want you to send and get it—write and get it for me," telling her that it was at Althena and that he didn't like the way it was made and when she told him she would not write for it he told her he would get Bill Parker to write for it. That her father was so very deaf she could not talk to him with any satisfaction and didn't try to talk to him very often; that after the 18th when Parker came, she heard him ask Parker to write for the will and that Parker says it was the 24th when he asked him to write for it; that she don't remember the exact date; that her father told Parker at the time his hand was crippled so he couldn't write a letter to do much good and wanted him to write and get the will; that she didn't pay very much attention to what he did say about his property—just "paid attention enough to show [137] respect and listen to him"; that she could hear him all over the house; that he would get dissatisfied and cry and say the will didn't suit him and would cry every day and that she would pacify him and tell him it would be all right and for him not to worry; that after the will came she put it away and it was not opened for several days, was burned a few days after he had the bad spell—might have been two or three days; that she read the will over his shoulder, could read it plainly, never told him she read it; never told anybody that she read it; that the will provided that the property be divided between the two boys and that she

(Testimony of Jerusha Crabb.)

was to have $200; that the will was dated the 25th day of October, 1910, and she thinks Homer Watts was one of the witnesses; he told her once before that he had made a will before he and his wife were divorced. That she got $10,000 out of her uncle's estate but that her father never knew how much she got out of it. That she believes it was on Sunday morning, the 5th of April, when two doctors were there and her father was operated on, and that Marvel got back there, the second time, the 10th or 11th of April, at which time her father was in bed and that she heard a conversation between her father and Marvel in the evening after he came, in which Marvel told him he had come to take him home, and that her father said to him, "Marvel, if you have come to take me to sign my property away I won't go ary step," and Marvel said he didn't have such intentions; and, the next morning her father called Marvel and told him he wanted the property divided equally, at which time her daughter was near by, and that he did [138] not want to go away if they wanted him to make any papers; that while her father and Marvel were talking she was in the kitchen preparing breakfast and her daughter motioned for her to keep still as the daughter was hearing the conversation; that thereafter her husband came, went into the room and she heard her father say to him, "On my word and honor, John, I want Jerusha to have one-third of this property. I never was treated any place better in my life than I have been here," to which her husband said, "Thank you," or something of the kind; that

(Testimony of Jerusha Crabb.)
she supposes her father was conscious at the time as they had been giving him so much stimulant so he would be able to travel, as he was taken away about an hour after the conversation; that when he was given a stimulant his mind would be better and that "he was stimulated up so I think he understood what he was doing. The more stimulant you gave him, the stronger his body was and the stronger his mind"; that when they would stimulate him he would brighten up all the time, and when that wore off, he went into a stupor."

Q. How often did you bathe him during the last days that he was there?

A. Why, after he had those pains, about a week before he took bad, I bathed his limbs sometimes two or three times a day and rubbed them with alcohol.

Q. But I mean give him a bath over his body and take care of him; what care did you give him in that respect?

A. Well, I gave him a sponge bath every day." That she went to the depot with her father when he was taken away, and that Marvel talked with her in a low voice [139] at the depot and said to her, "Jerusha, don't worry anything about the property. There has been family trouble enough, and I will see that it is divided equal and we will have peace." That was the first time she ever heard of her father having a will was when Marvel told her about it, the time he came there with her father; that Marvel said to her, "Jerusha, Father's got a will and I want you to get it and destroy it and get him to make another

(Testimony of Jerusha Crabb.)

one''; that she said to him, ''Marvel, this is the first I ever heard of it; never heard of that before''; that she told him she would not get the will, and she thinks Marvel told her the property was mostly willed to the boys and that he wanted her to get it and destroy it and another one made; that on the 3d day of April, Marvel, his wife and daughter and his mother (stepmother of witness) came to her home to see her father—came on Friday and all of them left on Sunday except Marvel and his wife who went away Monday, and that all of the time they were there her father was unconscious and never knew his divorced wife was there. That her husband never read the will, never had any opportunity to read it.

On redirect examination she stated that her father always seemed to think a great deal of her; that she thought lots of him, and as he grew older he seemed to think more of her every time he came; that he talked about his property and worried and said the boys would get away with it, get the property away from her and he wanted her to have her third; that she told him the boys seemed to think lots of him, especially Homer—an awfully good boy—who thought lots of him and that when she told him that he **[140]** would be quiet for a while, smile and be happy again. Then he could commence again; that she always tried to make him think an awful lot of the boys; that she does not know in whose writing the will was but was under the impression that it ended up by saying it was drawn by ''I, Homer Watts.'' ''It is drawn by I, Homer Watts,'' she thinks but is

(Testimony of Jerusha Crabb.)
not sure; that she got $10,000 altogether out of her uncle's estate but was out quite a bit of expense getting it. That the first time she ever heard of the will was when Marvel came up to her house with her father and told her about it, wanted her to send for it and said to her, "Father wanted me to get it but I was in a hurry. He wanted me to get it the day we left, but I was in a hurry and didn't have time to get it"; and that Marvel further said, "Well, Homer has never treated father right, and I don't want him to have any of the property. You should have your share. I feel that you should have your share, and I would like you to get it and have him make another will"; but she told him she would not do it and said to him, "It is not right. Homer is our brother and father's boy, and I believe Homer is a good boy, and I want to see him have just as much as I have or as you have. He is as much entitled to it as you or I." That her father told her his second wife had never treated him right and he did not seem to like her—seemed to be very bitter against her.

On recross-examination she said that when Marvel brought her father up to her home, she and Marvel walked out on the porch, and that Marvel told her about her father having a will and asked her to send and get it and [141] that she told him she would not do so, and told her that Homer had never treated their father right but that she told him Homer was a good boy and was as much entitled to the property as he or she and that she always thought lots of Homer, and that Marvel also told her that Homer

(Testimony of Jerusha Crabb.)
had his share and he didn't want him to have any more but wanted her to have her share of it. That she cannot remember whether Homer's name was on the will or not but she did know how it started and could repeat the first two or three lines of it a while but she thought the will was finished up with the words, "made by I, Homer Watts"; that most of the will was in "handwrite" and was dated the 25th of October, 1910; that it was the next morning after Marvel told her about the will that her father told her the boys had made him make the will. That her father told her when he left her house in 1912 he had no will of any kind and that he had told Mr. Parker the same thing, although she knows the date of the will was October 25th, 1910; that he repeated over to her almost every day the same thing about the boys would get away with the property and that she thinks after the will was destroyed he said, "I think they will do some way to get away with the property if they can." That when Marvel brought her father he said that her father wanted to come and he brought him.

On redirect examination she said that her father told her the mortgage on the farm had been paid; that he had told her he had given Marvel the money to pay it, let him have $2,800; that she destroyed all of the **[142]** papers that were worthless before 1913 and saved no letters back of that date as they had built a new house and moved, although she had letters from her father before 1913 written to her, only just a few lines at the time, from California; that all of the letters are in her father's handwriting

(Testimony of Jerusha Crabb.)

and she identified them (page 142, marked exhibit 1 to 11). Responsive to questions propounded by the presiding Judge, she stated that when she saw the will she could not recognize the handwriting of the will but did recognize the signature of her father thereon and that she believes it was signed "T. J. Watts," as he always signed his name that way; but she does not know by whom it was witnessed—does not remember the name.

On further recross-examination she stated that after her father came to her place the last time, 1914, he told her that he had let Marvel have $2,800, $2,000 of which was to be applied on a debt, and the other $800 held by Marvel for her father's traveling expenses; that "he talked about his business all the time, and to everybody, everyone"; talked about it to Mr. Parker, to her and to her husband different times; that he kept talking about these things "so much"; that he would be quiet a while and then would start in on the same thing again and would sit a while and talk about something else. **[143]**

Testimony of John Crabb, in His Own Behalf.

JOHN CRABB, one of the plaintiffs, testified that he got acquainted with T. J. Watts in Umatilla County in the year 1884; that he and his wife did not visit at the home of Mr. Watts very much until after Watts and wife were separated, six or seven years ago; that thereafter Watts came to his home about twice a year, usually in the spring and again in the fall, staying about a month or six weeks at the time,

(Testimony of John Crabb.)
staying all winter one time; called his home at Marvel Watts' at Athena; but asked as to where he lived during those years witness answered he traveled around and stopped where he wanted to and stayed as long as he wanted to; lived with a man named Skelton a while; he went to Skelton's every year except one, most years oftener, and with Tom Page in California a while, spending he thinks about four winters in California, was in the Willamette Valley part of one winter, and wrote letters to his wife, Mrs. Crabb, about once in two weeks or three weeks, and that his relations with Mrs. Crabb were very friendly, and they seemed to enjoy each other's association and spent many hours talking together (page 152); that the first time he knew of a will his wife told him and that he knew Mr. Parker wrote for it, that he and Mr. Parker were great friends, and that it came in about four days, he thinks; that Watts asked him to send for it but that neither he nor his wife would do so; that he was not present when the will was destroyed but Watts told him he had burned it up and further told him that he didn't want it at the start, had burned it up and was glad of it; that he heard him say he had given Marvel money to pay off a mortgage, and that it was paid, and further told him he was **[144]** out of debt—didn't owe anybody anything; that he talked about his property every day and it seemed to be on his mind more than anything else the last few years; would talk about how much wheat he raised, how much money he got for it, how much land he had, how the boys were

(Testimony of John Crabb.)

farming it. That he never heard him say what he was going to do with his property; that when Watts came there in the spring of 1914 "he was not what I call sick—he could eat a good hearty meal three times a day—but he was so feeble that he couldn't walk without being braced or steadied," and that he continued in that state of health ten or twelve days (see page 156) when he took the bad sick spell and the doctor was sent for on the 3d day of April; that on that evening Marvel Watts, his mother and family came between five and six o'clock, but Watts had got worse about two o'clock in the afternoon; that Watts was very deaf, spoke so loud that he would wake everybody up; that after the 3d day of April he would seem to talk all right for a few minutes about something that had happened a good many years ago and "thinks that he had told over thousands and thousands of times things that would come to his mind and he would tell it pretty good," then would have a bad spell and would forget what he wanted to tell you and not finish the sentence; that during that night, at eleven o'clock Marvel phoned for Dr. McIntyre who came and stayed the rest of the night, and the next morning Dr. Mitchell was also called and came about eight o'clock and the two doctors worked on him until about noon on the 5th day of April; that "From **[145]** the 3d of April to the 11th of April, when he left, he got some days so he seemed to be all right, talked about something that had happened a good many years ago for a few minutes at a time," and the balance of the time

(Testimony of John Crabb.)

he would say most any kind of thing; could not even raise up in bed without help; was very patient about being waited on, very considerate and seemed to think it "was very nice of me" for waiting on him and thanked him for it; was very good-natured and good-humored; that "I have taken care of a great many old people and he was an exception for he was not cross nor he never complained of the way he was taken care of, but was great to complain of pains"; that he did not consider Watts was sick—considered he was just worn out; that Watts was taken care of in the very best way that could be on a farm; that Watts was kept in a good bed with the best of springs, good, new wool mattress and feather-bed which seemed to suit Watts very well, and that the bed and room were kept as clean as could be under the circumstances, the bedclothes changed every day; that he had a kind of leakage of urine; that Dr. McIntyre came once a day excepting one day when he was there twice; that Watts did not want to go home with Marvel at first but told him that Marvel had come to take him to Athena, and, the next morning, he went into the room where Marvel and Mr. Watts were and that Mr. Watts told him he was going to Athena, that Marcel had come to get him and he was going with him, and further said, "I have made arrangements with Marvel and he is to be the administrator of my property, and he has agreed that the [146] property shall be divided into three equal parts and that Jerusha shall have her part of the property," and that Marvel was standing right there

(Testimony of John Crabb.)

and that Mr. Watts took witness by the hand and witness said to him, "That is all right. Now, Daddy, you needn't bother any more about it," and he seemed to be perfectly contented; that he and Marvel carried him out of the house when he went away; that when medicine was given to him it stimulated him and livened him up so that he was brighter than he was other times when it was faded away"; that he did not go to the train with Mr. Watts when he went away and that he never saw Mr. Watts any more until after he was dead.

On cross-examination he said that Mr. Watts was very deaf, liked to talk awfully well, said he had sold his wheat and that the boys had turned him over the money and Marvel had paid the debt, had given Marvel $2,800, told him about it every day, told him Marvel would be administrator of the estate the day he was taken away; further said that Marvel had agreed to give his wife one-third of the property, but prior to that time he does not remember any conversation in regard to his wife having one-third of the property until about a year before the last time he was there before (page 168) when he heard him say she would have one-third of it and he thinks he had heard him say the same thing a great many times before, but knows that he did say it those two times; that the day he left "he was strung up to the highest notch. They were going to move him and they gave him all (medicine) that they thought he could take for the trip he was going to take," and that he was brighter, could talk, could **[147]**

(Testimony of John Crabb.)

come nearer telling "you anything than he could before. But whether he was in his right mind or whether he was nervous, he was kind of excited"; that he talked about other things in a kind of excited way; that at other times prior to that day when he had a dose of medicine about five minutes, or ten —seven or eight minutes—he would begin to talk and could talk right along for "maybe an hour" and after that would grow stupid; that Dr. McIntyre prescribed the medicine for him; that it was the second or third day after Watts came that he—witness —was asked to write for the will; that Watts could write his own name—he could have written for that too (page 170). That Watts got a pencil and marked on a piece of paper to see how he could write, could write his name, could write most any word, but couldn't write as good as he would like to, his hands were "drawed out of shape"; was able to feed himself after his food was cut up for him until about the time he had the sick spell, used his left hand mostly; that the will came back three or four days after it was sent for and his wife told him about it being destroyed the same morning it was destroyed, told him the circumstances about her being left only $200; that the morning he had the bad spell when he (witness) went away Watts was sitting by the stove talking with nothing apparently the matter with him except old age, and witness came home between four and five o'clock; that the operation was performed the next day after he had the bad spell (page 173); that he does not think Watts

(Testimony of John Crabb.)

was in his right mind—was not himself at all—at any time after the operation except when medicine was given [148] to him. That he didn't hear any conversation about Mr. Watts not wanting to go to Athena because the boys would try to get him down there to get him to deed his property away—heard nothing of the kind; never did hear him say that the boys were trying to get his property away from him (page 176.) I heard him talk about his divorced wife—seemed to dislike her very much—didn't like her at all.

On redirect examination he said that he did hear Mr. Watts say that Homer wasn't honest and would get the property away from his (witness) wife if he could and said that lots of times with other stories he told every day.

On recross-examination he said that he heard Watts say a good many times when he was there the last time that Homer wasn't honest and would get the property away from his (witness) wife, and said it when he was there the first time—back in 1910—1911; that it was common talk with Watts back in 1910, 1911 and 1912, that Homer would get the property away from his wife if he could; that Homer was dishonest and would get the property if he could (page 177) and that Watts said this every time he saw him page (178), and that it was common talk with him in 1912, but that Watts thought Marvel was a pretty good fellow and would be his administrator, and that he thought Marvel's wife and Marvel's

(Testimony of John Crabb.)

daughter were "awfully nice" and found no fault with them in any way and that they were very nice to him (page 178); that he didn't talk any nicer about them than he did of his daughter's children; that he seemed to think much of her children too—that he didn't know as there was any difference. [149]

The plaintiffs, at this juncture stated to the Court that outside of some testimony in relation to the value of the property their case was concluded. Whereupon the defendants interposed a motion for an order to dismiss the bill of the plaintiffs upon the ground that they had not offered evidence sufficient to overcome, or even to balance the answers of the defendant called for and made under oath (pages 180-181).

Therefore the next day, April 7, 1917, Mrs. Crabb, one of the plaintiffs, was recalled and stated that she wrote letters to her father regularly but by some means at one time he failed to get them and wrote her every week until she finally registered a letter to him which he received. [150]

EVIDENCE OF DEFENDANTS.

Testimony of Homer I. Watts, in His Own Behalf.

HOMER I. WATTS, one of the defendants, testified that he was forty-one years old, was born and raised in the vicinity of the lands described in the pleadings, and made his home with his parents on the farm until he was about nineteen years old, when he would be away from home for a while but would

(Testimony of Homer I. Watts.)
return every summer and do harvest work; that there were five children of the marriage of his father and mother only two of whom were surviving—himself and Marvel Watts; that his mother died in March, 1915 and his father in April, 1914; that his parents were divorced in 1909, the mother keeping house and living in Athena and the father making his home with Marvel, that he is mayor of the city of Athena, serving his fourth term; that his father came to his home in February, 1908, badly injured, stayed there until June when he went to Marvel's house; this was before his parents were divorced, the parents staying away from each other a year before the divorce; that while the father made his home with Marvel he would go to California, to Spokane and would usually spend three or four weeks every summer in the mountains.

That on the 14th day of April, 1914, in the afternoon at his home in Athena he wrote deeds for his father, marked for identification Defendants' Exhibit "B" and Defendants' Exhibit "C," "B" being the warranty deed from his father to Vernita E. Watts, dated the 14th day of April, 1914, recorded in Book of Deeds, Volume 77, page 373; and "C" warranty deed executed by his father to Jennie Anderson Watts, same date, recorded in same book at page 372 of the Record of Deeds for Umatilla County, Oregon; that his father came to his home from Jerusha [151] Crabb's on the 11th day of April, was given a bath by witness and told him about the will being destroyed and further said, "I have made up my

(Testimony of Homer I. Watts.)

mind what I am going to do with my property as I suggested some time ago, that is going to give a part of it to your mother and I am going to provide for Vernita because she is a cripple and Marvel's wife. The balance of it I am going to leave to pay up the debts, and I hope you children will get good friends because you all have enough property. Let property not divorce you children any longer"; that this was on Saturday evening and he further said, "I want your mother to come over to-morrow," and she came, "I don't know whether I called her or how she came," and they had a lengthy talk, a part of which witness heard; that his father asked her how she was getting along and said to her, "Now, Lizzie, your time and my time for life is not very long and I have made up my mind to provide for you so you will not want." "My suffering during the last years has been intense" (page 189). "I want you to have every care that can be cast upon you," and asked her forgiveness and she asked the same thing of him; that his father wanted to know how much property she had and she told him she had plenty to keep her and that the boys had been good to her and that she did not know as she cared about property at all; she says, "the children that have made it are entitled to it and I would just let it go that way." That his mother stayed there that day but possibly went away that evening; that the same evening or the next morning he had thoroughly decided what he would do with his [152] property and wanted him to fix the deeds. "The reason I think it was

(Testimony of Homer I. Watts.)

that evening is because I am under the impression that on Monday morning I asked him to go down town with me—if he wouldn't go. It might have been on Tuesday morning that I asked him that, but I am under the impression that it was Monday. He said that it was too cold and he said he wanted to—why couldn't I fix them up and bring them up there. I said I could but I would prefer taking you down to the office if you can go. Well, on Monday I didn't take him. That conversation might have occurred Monday morning—I don't know, but he directed me how he wanted the deeds drawn, and he directed me that he wanted—No, excuse me just a minute. He said that he had intended to give the lower place—that is the 320 acres that was deeded to Vernita, to my mother so that she could have the income of it during her lifetime, and the remainder over to the little girl" (pages 190, and 191). That his father then directed him how he wanted the deeds drawn, saying that he would deed some land to Vernita because she was a cripple and that "she has been closer to me possibly than anyone else in life during my old age, being around me so much," and he wanted the other deed fixed so that "Marvel's wife takes the title to the property, and I will take the income off of it because that will be plenty to keep me," and that there would be eighty acres left with which to pay the debts, and further said "Now, Homer, Jerusha understands how the property is to go and why she is not getting any of it, because it has been a mutual understanding that she got her

(Testimony of Homer I. Watts.)

property from [153] Uncle Marvel," and that Marvel (defendant) would have no objection as the property would go into the family; that he told his father he would prefer that somebody else write the deeds but that father said to him, "you are the only one that is going to cause a lawsuit in this matter and I want you to attend to it and attend to it right"; that he told his father he would not cause any lawsuit; that he went away from the house but came back about eleven o'clock to take his father to the office and fix up the deeds there, expecting to get Mr. Le Grow to draw up the deeds or to witness them, as Le Grow had done a great deal of his father's business at the bank, and that when he and his father got nearly to the bank Mr. Le Grow was coming up the street; that he and his father then went to the drug store and got some medicine, that his father called Byron Hawks, the druggist, who came out of the store to the automobile and talked to his father while he went into one of the stores; that there were other people there who spoke to his father —Henry Dell, Sam Hut, George Winship, Jack Vincent, Sam Booher; that Byron Hawks filled his father's order for medicine and they drove away a distance of about five miles, returned to his home in Athena and started to drive out to the ranch. The roads were rough and instead of going to the ranch they went in another direction; "I talked with father that day at some length both about the property," "got back home between twelve and one o'clock, when his father was placed in a chair by the

(Testimony of Homer I. Watts.)

stove where he ate his dinner; that when he (witness) started away his father asked him to come back with the deeds; that he [154] went to the office, wrote the deeds, went back to the house with Guy Jonas but his father was asleep. "And Mrs. Carden, who was waiting on him, had asked me prior thereto to come home early in the evening so that she could go up home after something or other. And when I came in—I had been much longer than I expected to be—and I told my wife that she could take Mrs. Carden to the house if she wanted to. No, I told her to take the car and takes Mrs. Carden. That is what I told her. So she took the automobile and took Mrs. Carden and they were gone possibly forty-five minutes or an hour. I think either Mrs. Carden or my wife said to me 'How long will you be?' and I said 'Some little time if you want to go out for awhile'; and whoever it was said they would be gone some little bit; they would take a ride or words to that effect." That Mrs. Carden, the nurse, and his wife went away in the automobile, leaving himself, Guy Jonas and his father at the house; that he and Jonas helped his father out in the front room where his father talked with Jonas, asking him about different things in the family and "father or I" spoke about the deeds; that he took the deeds out of his pocket read them to his father carefully, read each one separately, discussed the deeds with him, the description of the property, and that his father said. "That is the way I wanted the property fixed"; that his father took hold of the pen but his

(Testimony of Homer I. Watts.)
hand was crippled and he said to witness, "Write the name for me," which he did and his father touched the pen as he made the mark for him, and he and Guy Jonas witnessed them; that he had his seal with him, took his father's acknowledgment to the deeds. That his father **[155]** asked Guy Jonas to sign as a witness. That his father was sitting in an armchair at the time; that after the deeds were signed he gave them to his father, sat and talked with him until the women-folk came, when he and Jones put his father to bed; that his father gave the deeds to him and told him to give them to Marvel Watts or record them; that he took the deeds to his office, gave them to Marvel the next day, he thinks on Wednesday noon, had some talk with Marvel about it, and thereafter Marvel gave the deeds back to him and asked him to record them the next day as he was going to Pendleton to try a case. "I took the deeds and put them in my pouch. I came down Wednesday night to the dance. Thursday morning I came back—I was late because I had been out late. I was busy in court all day and did not record them until—Friday I was busy all day and didn't record them—as a matter of fact I believe they slipped my memory more than anything else—and I told him that I didn't record them—I have it on Monday. I might be mistaken about that, but I know that he said it looked to him like I would attend to anything when I was asked to." That witness was busy here in Pendleton Thursday and Friday trying a law case; gave the deeds back to Marvel and did not see

(Testimony of Homer I. Watts.)
them any more, as he remembers it, until his sister had some proceedings in the county court for an accounting.

That he is an attorney at law, practicing in the courts regularly. That regarding the land deeded to Marvel's wife, his father wanted it fixed so that he could get the income as long as he lived; that his father paid very close **[156]** attention to the matter and said it was just as he wanted it; that he recognizes the two instruments, Defendants' Exhibits "B" and "C" to be the identical instruments executed by his father on the said 14th day of April, 1914; that his father knew every piece of land he owned by legal description and could tell whether it was in section 31, section 32 or what, knew them by memory, and that when he read the deed conveying the land to Marvel's wife his father told him that he had it in the wrong section and that he read the description again very carefully and his father said that it is right; that his father was hard of hearing but that he could make him understand by getting up closs to him and talking to him; that Guy Jonas was present during all of the time of the execution of the deeds—went with him to the house where the deeds were executed and then went away with him thereafter. That he never did talk to his brother, Marvel, before the execution of the deeds, about their father conveying property in any manner; "that father's property was never talked over between us boys" (page 202). That his father did his own business and was not a man to be controlled, and that he and

(Testimony of Homer I. Watts.)

Marvel never talked the property over until after the deeds were executed, and at the time he delivered the deeds to Marvel; that when his father and mother had a property settlement the father gave to the mother property in Athena which sold for $700, and also gave her 160 acres of land which was afterwards sold by her to Marvel and himself for $11,000; that after his father and mother were divorced they were better friends than he had ever seen them before—their trouble was **[157]** incompatibility and after they were divorced they visited with each other, and when his mother would be sick his father would visit her frequently, sometimes every day; that his mother had cancer of the stomach and had poor health the last few years of her life; that after they were divorced they would both visit at the home of the witness frequently. That he never did prepare a will for his father and never saw one that his father had prepared, but heard his father say before he went up to Jerusha's that he had a will and that after he came back from Jerusha's in April, 1914, his father told him about the will being destroyed and said to him, "It don't make any difference, Homer. I am absolutely satisfied with it, I have made up my mind what I am going to do with that property"; that his father did his own banking, his own transactions, and didn't talk property to him to any extent. That he does not remember having seen his sister, Jerusha, until he was about ten years old when she and her husband came there and that he saw her only three or four

(Testimony of Homer I. Watts.)

times after that when she would stop at his father's home in passing through the country, usually stopping over night, stopping one time nearly a week; that he does not remember seeing his sister from the spring of 1908 until after his father died; that he would not have known the woman (page 207); that when she came to the funeral he talked with her a great deal, told her that the last two days of his life he was unconscious and that she said to him that it was too bad that Marvel didn't let him die while he was up at her place and be out of his misery, as he only had a few days anyway and that she further told **[158]** him if Marvel hadn't sent to Colfax and gotten a doctor her father would have died and been out of his misery.

That in talking over property matters with his father after his father was brought to his place from Jerusha's his father said to him, "Now, Homer, I am not going to leave any of you anything so you will have nothing to law about," and that he told his father it was entirely satisfactory, in a sarcastic manner (page 209), and that his father further said that while he was up at Jerusha's she didn't feel right about the boys getting the property and asked him to send for the will which he did, and that on the morning of the day that Marvel came to Jerusha's they had gotten a phone call that he was coming and that Jerusha got the will, opened it, and asked him if he thought it was a just will and that he told her possibly it was not and possibly it was and that she must remember that she was raised by

(Testimony of Homer I. Watts.)

her uncle and got her inheritance there and that she had not helped to make any of the property, and that she insisted the will was not just and that she had been a hardworking girl and had not had the opportunities in life the boys had had and wanted him to destroy the will. "Father says you may destroy it if you want to, and during the discussion the way he explained it to me was that she gave him the will. He took it in his hand and she said, 'You can throw it in the stove.' Father said, 'That is satisfactory, Jerusha, we will just burn it up.' And that she and the girl raised him up and his arm was weak, he said, and he had it in his right hand, if I understood it right. Jerusha lifted his hand and he threw it in the stove. **[159]** Father said, 'That is perfectly satisfactory, Jerusha; I am willing for the will to be destroyed.'" That his father after telling him about the destruction of the will, further told him he had heard so much talk about property since he came up to Jerusha's that he knew there would be trouble if he tried to divide it as he had expected and that he had made up his mind about deeding it away (page 210), and that his father further said to him, "Now, Homer, you are most likely one to cause a lawsuit and I am going to insist on you fixing the property, put you on your honor that you are not going to deal with property or cause any lawsuits." That he himself has never gotten any property out of his father's estate; that they were poor people and of course he was provided for the same as the other children, and that when

(Testimony of Homer I. Watts.)

he went to school he always paid his own way with the exception of about $450 which his father advanced to him at different times when he was in school and that he endorsed his note for him for over $1,000, but that after he returned from Harvard University he and Marvel got a lease on his father's lands and have been farming them since.

That prior to the execution of the deeds he never had at any time talked with Marvel Watts, or with the wife of Marvel Watts about how his father was going to convey the property, and mentioned it for the first time when he gave the deeds to Marvel (page 212); that there is absolutely no arrangements or agreement at all between himself and Marvel Watts and the other defendants or any one of them by which they are to be the real owners of **[160]** the lands and receive the benefits therefrom (page 213); and that he and Marvel had leased the lands from their father paying him one-third of the crop as rental and they have been farming the lands deeded to Jennie and Vernita since the death of his father, carrying on the farming in the same manner that they did prior to the death of the father, and that he himself has no agreement or understanding with Marvel Watts or any other person that he is to finally or at any time become the owner of any part of the real property described in the pleadings (page 214).

Upon cross-examination he stated that his father had first acquired 160 acres of land, then with money belonging to his mother they bought 40 acres more

(Testimony of Homer I. Watts.)

of said land (page 215); thereafter he bought 160 acres more when witness was about ten years old and part of which is land deeded to Vernita Watts; then about 1896 about 135 acres more, thereafter another quarter section which was given to the mother in the divorce proceeding; that his father conducted his own affairs.

"Q. Now, you and Marvel always thought that because Jerusha had gotten something from her uncle's estate, and because you had as you claimed helped to make this property, that she ought not to have any of it, didn't you?

A. I am not speaking Marvel's thought; I will speak my own only.

Q. All right.

A. I gave it but little thought, Mr. Bennett. I gave it no thought hardly at all, because father conducted his own affairs in life. I did hear father on numerous occasions telling his neighbors about his daughter [161] Jerusha and about her getting the property and that the boys would get this property. Now I have heard him say that.

Q. Now, hadn't you talked it over, you and Marvel among yourselves, that you had helped him make this property, as you claimed, and that she had had a part of her uncle's and so she ought not to have any part of this?

A. That is not a fact.

Q. You claim that you never talked that over at all?

A. Absolutely claim that I never talked it over

(Testimony of Homer I. Watts.)
with designs and purpose. If it was spoken it was spoken in the family circle.

Q. Designs or otherwise, had you talked that over?

A. We had made it no topic of conversation. There might have been some mere passing word between us, something of that kind. I do remember this, that that subject was talked between my father and mother in the family at different times, of father saying what Jerusha got from Uncle Marvel and she would get more than he was ever able to give the rest of his children. I remember that.

Q. You do remember, then, it being talked over while your father was living with your mother?

A. Years ago when I was a child.

Q. Well, now from that did you and your brother Marvel join in that conversation?

A. It was not our conversation.

Q. Well, did you join in it, did you have anything to say about it at all? A. No.

Q. Did you at any time express yourself to each other that you boys ought to have that property and she [162] ought not to have any portion of it?

A. I positively deny the charge.

Q. You never did talk with your brother about that?

A. I don't believe I ever said it in my life.

Q. In your family circles at all? A. No, sir.

Q. Now, then, at these times when this thing was talked over between your mother and your father at the family circle, Jerusha Crabb was far away—she was not there, was she?

(Testimony of Homer I. Watts.)

A. I don't believe I said it was talked over; I said it might have been talked over, if I remember correctly. That is the only answer I am going to make to it. It might have been talked over. I might have heard it.

Q. Do you mean to say now that you don't know that you ever did hear that matter talked over?

A. I don't know that I ever did.

Q. Between your father and mother?

A. No, that is what I mean to say. I say I might have heard it.

Q. Didn't you say a moment ago that you had heard that talked over frequently?

A. Well, I said I might have heard it; I don't say that I didn't—I don't say that I did."

That he started to school when he was about eight years old, about a mile and a half from home, walking back and forth, the school term being about three months in the fall and three months in the spring and that when he got older his father would keep the boys out of school possibly a week or ten days in the fall and spring to help him with the farm work; that when he was about ten or eleven years old he began to work out for wages and bought his own clothing but boarded **[163]** at home and went to school and that he never went to school at any one time in any one year longer than five months until he was sixteen years old, thereafter he attended the Athena High School about seven months, had to go four miles, but boarded at home, and then the school at Weston in the fall of the year 1893 for about

(Testimony of Homer I. Watts.)
thirty weeks, still boarding at home, going five miles; that when he was sixteen years old he started to sewing sacks in harvest at $2.00 per day, would take his harvest money and buy clothing and help buy books and that his father would help buy books for him; that he was in the Weston school about a year and three-fourths, stayed at home and worked all of the next year, then went to school at Monmouth, Oregon, for forty weeks, his father furnishing him the money—$225.00—his school bill that year, and also furnished the money for Marvel to go to the University that year; that he began teaching school in the fall of the year 1897, and taught one school year at $40.00 per month—about nine or ten months, boarding away from home three months and the rest of the time at his home; thereafter he went to school about seven months in California while he was there helping to take care of an invalid brother; then went to school three years at Eugene, beginning with the fall of 1900, quitting in 1903, taught school a year at Ashland Normal, then went to Harvard University three years; that his brother Marvel also had a college education and his expenses paid about the same; that his father never contributed anything towards educating Jerusha and that she didn't have any college education. His mother died in 1915 and left a will in which she gave $1,000 to Vernita Watts, a house and lot to his wife, and the balance of the property to himself and Marvel. That he [164] and Marvel were farming about 1,000 acres of land at the time their father died; that Vernita Watts

(Testimony of Homer I. Watts.)

is the only child of Marvel Watts and wife; that he never had anything to do with managing his father's business and that his father was a man who didn't talk to him much about his business, was an independent man, had his own convictions and controlled his own mind, was of sober and religious temperament, had been a minister, nothing deceitful about him and when he said anything on business affairs he meant it and considered his word "the binding link." That he knew when his brother Marvel went up to get his father and bring him down—knew he was going to bring him down. It was arranged before Marvel went up that he was to bring him to my house; that he didn't know how many winters his father spent in California after he was divorced, but thinks it might have been one or two, possibly three. He would generally go down in November and stay until the spring opened up in March or the first of April; that he went to the Willamette Valley one winter, but don't know how long he was gone; didn't know he had ever been to Kennewick but once; that was in the fall of 1913; don't know how long he was there before; don't know how long he stayed at Athena the last time before he went to California; knows that he spent part of the time during the last five or six years at Jerusha's but don't know how much or how many times. Remembers that two or three different times when he came down from Spokane he spoke about seeing her as he came down and as he went up; that Marvel went after his father to California in response to a tele-

(Testimony of Homer I. Watts.)
gram; thinks he heard he had also received a letter from Jerusha which she had sent down. He thought she sent father's letter to him. That was the [165] middle or latter part of February. That Marvel was gone to California three or four days or a week. When he came back father stayed at Marvel's house until some time about the middle of March and then went up to Jerusha's. "I didn't see him any more until Marvel brought him back on Saturday, April 11th; when they brought him back they took him up on a dray and stopped at my office, and I got on the dray and went up to the house with them. Don't think any arrangements had been made about a doctor or nurse before he came, but I am not sure." That before his father went up to Jerusha's he told him he was going to visit her awhile and then come back to his place and visit; that when his father returned from California in the spring of 1914 he complained of pain in his feet, complained of his feet and legs hurting him and was not as well as when he left for California; went from Marvel's home to the home of Jerusha and he did not see him until he was brought back to his home in Athena on Saturday, the 11th day of April, 1914. The next morning, Dr. Sharp and the nurse came. Dr. McIntyre was also there that morning but his father was asleep and did not talk to him and Dr. McIntyre said, "If he is asleep, just let him sleep; the other doctor will look after him"; that he first noticed his father getting low, unconscious, on Saturday, the 18th of April; that his father always had a strong voice.

(Testimony of Homer I. Watts.)

"Q. Now he came home on the 11th? A. Yes.

Q. Do you claim to have had any talk with him about business affairs that day?

A. I claim to have talked with him that night, and he didn't let me go to sleep until two o'clock that night either. [166]

Q. Now, the next day, the 12th, do you claim to have had a talk with him about business matters again that day?

A. Yes, sir; I talked to him Sunday—yes, I think I did. Now, Sunday was the day he talked to mother, and I think I talked to him that evening —although I can be mistaken about that; if I didn't that evening it was the next morning.

Q. Did you talk to him about business on the 13th?

A. Well, I don't know; I have got it in my head that I did; I have got it in my head that I asked him to go downtown with me that day, or asked him to let me take him downtown that day.

Q. Do you remember clearly whether you did or not?

A. No, because I have been told that I did not.

Q. Now, during the time that he was there, how many times did you take him out riding?

A. I took him down the one time.

Q. Just the one time? A. Against his wishes.

Q. You took him against his wishes, you say?

A. Yes.

Q. And that is the only time you did take him?

A. Yes.

* * * * * * * * *

(Testimony of Homer I. Watts.)

Q. That is the only time he was out of the house while he was there?

A. I don't want to say yes or no to that; the chances are it was." (See pages 245–6–7).

That when he took him out he meant to take him to his office and write the deeds and his father said there was no use of it as (witness) could write the deeds and bring them to the house, the deeds were written the same day that he took his father out riding; that while he and his father were out driving they were gone about an hour and a half. That Guy Jonas came to his office to see about **[167]** a note he had for collection and went with him to the house when he had the deeds with him, at which time Jonas was in the saloon business but was "a friend of mine the same as the rest of the people in the town, I suppose." That he took his father out of bed and put him in an automobile that morning and that he was the one who put him to bed after he got back. (See page 253.)

"Q. At the time the deed was drawn you had a good deal of experience in the matter of the disposition of property by old people in view of death, hadn't you, drawn wills and deeds, and so on?

A. I cannot say that I had had any more than any other country lawyer would have during the time I have practiced, possibly gotten my share of it.

Q. About that time were you one of the attorneys for Mabel Warner in the famous Mabel Warner will case? A. I was at one time.

Q. When was that?

(Testimony of Homer I. Watts.)

A. The last time the case was up I was attorney for her. I think it was before this deed was drawn.

Q. Now, at the very time this deed was drawn, you were also engaged in a will case involving the estate of an Indian or half-breed out on the reservation, who you claimed had willed his property to the amount of about $15,000 to you?

A. Well, Mr. Le Grow will answer all that. He is here. He will answer all that.

Q. Well, I am asking you.

A. Yes, he made the will. Mr. Le Grow is the man that made it, I believe.

Q. You testified in that case your wife drew the will. **[168]**

A. She drew the will, but it was executed before these people.

Q. But your wife drew the will?

A. Yes, under the dictation of the old gentleman.

Q. Now, in that will he purported to have given you practically all the property he had, didn't he?

A. Yes, he did, yes.

Q. And at the time this came up you were in a contest with his heirs over the validity of the will?

A. 1914—let's see. I don't know whether I was or not. I expect that is right, yes.

Q. Yes, and this man Guy Jonas was one of your witnesses?

A. In that will contest? I don't know whether he was a witness or not. Practically two-thirds of Athena were witnesses on that thing, but I don't re-

(Testimony of Homer I. Watts.)
member whether Jonas was or not. I expect that he was.

Q. And he was one of your principal witnesses, wasn't he?

A. No, he was not a principal witness; nowheres near it.

Q. Wasn't it by him that you proved or undertook to prove the different sums of money you claimed to have let this Indian have?

A. Guy might have known something about it but he is not the one that proved the money I let him have, by any means, nor is not the one to prove any material issue in that case that I can remember of at this time.

Q. You had him testify that you had left a good many sums of money in his saloon for this Indian at different times, and he had paid it over to the Indian when he came in?

A. I would rather the record in that would be shown, rather than for me to go to work to reiterate.

Q. Don't you remember that?

A. I don't know; there were volumes of that. [169]

Q. Don't you remember leaving money there at his place for this Indian?

A. Possibly I did—possibly I did. I don't say that I didn't.

Q. Don't you remember whether you did or not?

A. At this time I do not remember." (See pages 251-2-3.)

That when he wrote the deeds and got back to the

(Testimony of Homer I. Watts.)
house with Guy Jonas, his wife, father, Mrs. *D*arden and her little girl were there, but that Mrs. Carden, his wife and the little Carden girl didn't stay hardly at all (page 255), went away, as Mrs. Carden had been wanting to go home that day—went away in an automobile; that he had no talk with his father about the deeds before she left and that his father wo*rk* up just about the time the automobile started, called to him and he went into the room, at which time he, his father and Jonas were the only persons in the house, and they stayed there until his wife and Mrs. Carden returned; that Jonas went back with him to town; "that father was still sitting in the room when Mrs. Carden came back." When he went in the room his father wanted to get up and ask him something about the deeds; Jonas fixed the chair and they sat him in the chair, and he talked to Jonas a few minutes asking him about old times and about his father, the Jonas family, as he was acquainted with the father of Jonas long years ago. The deeds were spoken of and he told his father he had them written, read them over slowly to him; don't remember where the deeds were when Mrs. Carden came back; had them in his pocket when he and Jonas left the house, gave them to Marvel Watts the next day that Marvel gave them back to him he thinks that evening, but that he himself did not have the deeds recorded and does not remember whether he gave them back to Marvel on Saturday or Monday but that Marvel claims that it was [170] Saturday; that the lands described in the deeds are all the

(Testimony of Homer I. Watts.)
lands his father owned except an eighty acre tract and there was no mortgage on it; that he did not have a dollar at the time of his death; that during the last five or six years before his death father had expended his entire income. There was nothing paid on the $3,000 mortgage. (See pages 261–2.) There was a mortgage of $3,000 on the lands deeded to Vernita; that about 165 acres—a little over half—of the Vernita Watts lands are in cultivation and is good land; that the eighty acre tract not deeded to anyone was sold for $4,101. That the land that went to Mrs. Watts joins some land held by him and his brother in common; that he and Marvel in closing up the estate sold the eighty not conveyed and paid off the mortgage on the land deeded to Vernita; the eighty did not bring quite enough to pay off the mortgage and expenses and so there was nothing left for Jerusha or any of the children. That he was attorney for the estate and his brother Marvel was the administrator; that Mr. LeGrow owns the eighty now, and witness and his brother are farming it. LeGrow is the cashier of the bank and Marvel is a stockholder and director. (Pages 263–4–5.)

That his father was about eighty-two years old at the time of his death; that in his opinion the cultivatable land deeded to Vernita Watts is worth $100 per acre and the balance of it about ten ($10) dollars per acre; that the lands deeded to Jennie Watts would be worth eleven thousand ($11,000) dollars for one parcel and about three thousand ($3,000) dollars for the other. (Page 267.) **[171]** That before

(Testimony of Homer I. Watts.)

his father went up to Jerusha's he said, "If I get worse I will want one of you boys to come up and get me. If I get better I will stay up there for a while; then I could come down and visit you a while before I go away again"; but that when his father did come back he heard him say to his mother, "It is time, Lizzie, we fully understand each other because our time is not much longer for this world." That his father told him the will was destroyed the same day Marvel got up to the home of Jerusha's (page 270), after they had gotten a telephone that Marvel was coming. That the witness Parker was an old friend of his father and an old neighbor of theirs and used to stay at their house a great deal, and was an old neighbor of theirs (page 270.)

"When Jonas was at the office in the afternoon—whether I told him before he went up to the house or not I don't remember; but either I suggested that he go up to see father, or he suggested going up to see him. He was there at several different times. He was there at different times other than this day to see him." (Page 272.)

On redirect examination he said that the first time Guy Jonas came to the house on the day of the execution of the deeds was to see him about the note he had for collection over in Washington, at which time he and his father were getting ready to go out in the automobile and that Jonas helped to put his father in the automobile, and he told Jonas to come back to the office in the afternoon and he would tell him about the note, letters received concerning it, and

(Testimony of Homer I. Watts.)
that Jonas did come back in the afternoon to see about it, and then went with him to the house where the **[172]** deeds were executed; that in addition to being in the saloon business in Athena Jonas at one time "took over the Athena Hotel," run it for a time and then sold it; sold the saloon, bought horses for Jinks Taylor (page 272). That about two days before his father went to Jerusha's he was out automobiling with him, going to a stock sale about five miles away; that his father made his home with him quite a while in the fall of the year 1912 and also in the spring of 1913 (page 273), his house being a little over a block away from Marvel's house, and he and Marvel having lived that near each other four or five years; that at the time of the execution and acknowledgment of the two deeds there was no difference, that he could see at all in his father's condition and as it was on Monday, Tuesday, Wednesday and Thursday—his mind appeared to be as bright as it ever was in his life; that when he and his father went to the Mansel sale about the first of March, his father told him he was going to give Vernita some property (page 276); that the first suggestion made by his father to him about deeding the property to Jennie and Vernita was after he had talked, on Sunday, with the mother of witness—thereafter, either Sunday evening or Monday morning, his father told him how he wanted the deeds written, and said to him, "Homer, you have no children, and Vernita is the only grandchild I have here, and she is a cripple, and I have been wanting them to doctor her more, and

(Testimony of Homer I. Watts.)
offered to pay her doctor bills if they would doctor her more, I am willing to doctor that girl," and further said to witness, "You can make it first rate in life because you are getting along well," and further said, "Marvel's wife has been better to me than ever my mother was, and she is certainly entitled to something for **[173]** the kindness she has shown me" (page 278). That his father had made up his mind absolutely without any suggestion on his part; "that was the reason I wanted to bring him downtown to have the deeds executed down there." (Page 278.) That after the deeds were written his father was out of bed several times, ate several meals at the table. (Page 279.)

"In answer to questions by Judge Wolverton, the witness stated that his father had died about eight o'clock, about three hours before the dates when the deeds appear to have been filed for record--that the deeds were not in his possession at that time."

"Q. (By COURT.) Are you and your brothers large owners jointly in real estate?

A. Well, we are owners in this: A year ago last fall I started to go to Montana and he had a chance to buy some land out there, which he said if I would buy with him he would go halvers with me on it.

Q. You can answer shortly—are you large owners in real estate?

A. Yes, about seven hundred or eight hundred acres." (Pages 280–1.)

On recross-examination, responsive to an impeaching question, witness stated that he did not tell Judge

(Testimony of Homer I. Watts.)
Fee and Judge Hannah and John Crabb that he had had the deeds recorded himself and that Marvel Watts did not so far as he knew know anything about the deeds until after his father's death. He denies any such conversation. [174]

Testimony of Guy M. Jonas, for Defendants.

GUY M. JONAS testified that he lives in Montana, is married, has two children, is forty-seven years old, is farming 300 acres of land there, lived at Athena, Oregon, for a time in 1907, returned again about 1910, and remained until about a year before the trial (page 284); that while in Athena he was in the saloon business, in the hotel business, worked for wages on farms, was acquainted with Thomas J. Watts, and that Watts claimed to be acquainted with the father of witness and all of his people; that he was a witness to both of the deeds in evidence, signed his own name thereon in the presence of Homer Watts and the said T. J. Watts; that he came to Homer's office on a little business, Homer was gone, and he walked up to Homer's house, spoke to Homer about the business but that Homer was going out riding and told him to come back to the office in the afternoon; while there he saw T. J. Watts, helped to put him in the automobile, went downtown, went back to Homer's in the afternoon with Homer about which time the women went away in the automobile, and Mr. Watts asked Homer to take him up, which he did, and then said to Homer, "Did you fix the papers?" to which Homer said, "I have got them in

(Testimony of Guy M. Jonas.)
my pocket." Then Homer read them to his father, who corrected him on one piece of property, saying, "You haven't that right," and described the land himself to Homer. Homer told his father that was the way he had it and his father said, "Well, go ahead and read them again"; that Homer read them again and his father said, "That is the way I want them deeds fixed"; that Watts said he couldn't write, couldn't see the lines good, couldn't hold the pen, and told Homer to write his name. Homer made the mark and his father put his hand on the pen while he was [175] making it; that witness then signed his name as he was asked to and Homer also signed his name; that no other persons were present than himself, T. J. Watts and Homer I. Watts; that at the time the deeds were signed, Watts was sitting in the front room in a chair, talked a good deal, Homer said, "Guy can sign that all right," and his father said, "That is all right enough"; that Homer gave the deeds to his father who kept them in his lap a while, then handed them back to Homer, told him to give them to Marvel and have them recorded. That he asked Watts if he enjoyed the ride and he told him that he did; that he saw Watts the next day when he was asleep; that he never saw the deeds thereafter until he came as a witness in this case.

"Q. Now, prior to the time of signing these two instruments, when had you seen him, that is, how long before this day?

A. I had seen him, I think, a couple of days before then. I seen him the night they fetched him home

(Testimony of Guy M. Jonas.)

but didn't talk to him." (Page 288-299.)

That he used to see Watts often while he lived at Athena and talk to him, sat around the hotel and talked to him, met him on the streets and talked to him; that he did not observe any difference in the general condition of Watts the day he saw him make his mark to the deeds than when he had noticed before, only that he was sick (page 299), "Complained of being sick. As far as his conversation is concerned it run just as it always did ever since I knew him."

On cross-examination he testified that Mr. Watts was a little deaf but he could always make him hear him.

"Q. When you saw him then that day did he seem very sick and feeble?

A. Well, he was feeble, sure.

Q. And seemed to be sick? [176]

A. Well, he complained of being sick." (Page 290.)

That witness had gone to see Homer Watts that day about a note he was having him collect up in Washington—a $300 note; that it was about eleven o'clock when he went to Homer's house the first time that day and that Mr. Watts, Marvel Watts, Homer Watts, Mrs. Watts and Mrs. Carden were there; that he went from his saloon up to Homer's office that morning (page 291) and that he himself left as soon as Mr. Watts was put in the car, he thinks that Bert Cartano was also there; that he helped Homer get Mr. Watts from the bed in the house to the auto-

(Testimony of Guy M. Jonas.)

mobile (page 292); that after he left it was possibly two or three o'clock in the afternoon before he returned with Homer, but that he has forgot and cannot give any definite time, but as near as he can tell it was between one and three o'clock. That it is about three blocks from Homer's office up to his house; that no other persons were present about the house when the deeds were executed than himself, Mr. Watts and Homer; that some quilts were fixed on a chair and Mr. Watts placed on them in the front room just before signing the deeds. (Page 297.)

That he don't know who he left in charge of his saloon while he was gone.

"Q. Now, Mr. Jonas, who owned that saloon that you were running there?

A. Why, I was supposed to own it.

Q. Well, did you own it? A. Yes, sir.

Q. Entirely by yourself? A. Yes, sir.

Q. Nobody else had any interest in it?

A. No, sir.

Q. Didn't Homer Watts have any interest in it?

A. No, sir.

Q. Was he backing you in it? A. No, sir.

Q. Did you have any money borrowed from him?

A. I did. [177]

Q. To run the business? A. Yes.

Q. You had money borrowed from him to run the business at that time?

A. I don't say what I am using the money for.

Q. Well, you were using it to run the business?

A. Not necessarily, altogether.

(Testimony of Guy M. Jonas.)

Q. Well, partly? A. Hum-m.

Q. And Homer was in the habit of being around your place a good deal?

A. No more than any of the rest of them, I suppose.

Q. In the habit of leaving money there for people?

A. Never left no money around the saloon for any people that I know of.

Q. Didn't he leave money there with you for John La Roque?

A. When I was in the hotel he left some money there for him.

Q. Didn't you testify in the case of Watts vs. LaRoque that he had left money there at the saloon at different times?

A. At the hotel, when I was running the hotel.

Q. Did'nt you testify he had left money at the saloon at different times with you?

A. At the hotel.

Q. I am not asking you about the hotel, but didn't you testify he had left money at the saloon for John La Roque?

A. I testified he left money for John La Roque at the hotel I used to run.

Q. I am not asking you that. I am asking you whether or not you testified that he had left money at different times for John La Roque at the saloon.

A. No, sir.

Q. In the case of Watts vs. La Roque you were a witness for Homer Watts? A. Yes, sir.

(Testimony of Guy M. Jonas.)

Q. You were there every day of the trial, weren't you? A. I was.

Q. (By the COURT.) Did you hear Homer Watts take the [178] acknowledgment to his father's deed? A. Yes, sir.

Q. What did he say?

A. I don't know just how he worded it, but he had that seal—the seal there—and he put that on. I am not lawyer enough to tell you the words that he said now.

Q. Can't you remember anything that he said about taking that acknowledgment?

A. Homer asked him something but I don't understand now what it was, the same as anybody would take an acknowledgment, I suppose though.

Q. How is it taken?

A. I can't word it—I don't know."

Testimony of David Taylor, for Defendants.

DAVID TAYLOR testified that he lives at Athena has been a resident of Umatilla County since 1869, except one year; is the father of Sheriff Till D. Taylor; is seventy-six years old, a warehouseman by occupation; has been in that occupation about thirty years. Got acquainted with Thomas J. Watts about September, 1870; lived five or six miles from him for a time, saw him often; met him at church, at different places; associated with him about as much as anyone else in early days; saw him a good many times after he was divorced; would call and see him when he would not be well; knows that he got his

(Testimony of David Taylor.)

shoulder hurt after he was divorced and made his home with Homer for a time and saw him at Homer's while there and talked with him; but after that time when he was in Athena he made his home at Marvel's but went off on trips—to the mines, to Medical Lake, to California; talked with him in March, 1914, at Marvel's after he returned the last time from California about property, about Tom Page, and old [179] acquaintances, his trip to California; that Mr. Watts told him Homer didn't seem to take any interest in him, didn't seem to care for him, didn't come to see him and that he was going to have a talk with Homer and his wife and see what was the trouble; told him about making a will in which he had willed the girl, as he under*stand* it, $500, and the rest of his property was equally divided between Homer and Marvel, but further told him that if Homer didn't look after him better or didn't pay more attention to him he didn't know that he was satisfied with the will and didn't think he was satisfied with the will; but said that "Marvel's wife would crawl on her hands and knees up the stairs to wait on him." (Page 305.) Witness thinks perhaps he himself told Mr. Watts that if one of his boys were to turn him down when he was old and could not help himself he would turn him down when it came to giving him anything. (Page 305.) Said he was going up to his daughter's in Palouse to pay her a visit. She wrote for him to come up and he was going up to see her and stay a while and come back. Further told him that Marvel had no

(Testimony of David Taylor.)

bedroom downstairs and that he couldn't get up the stairs very well and that Marvel's wife was sickly, and that Vernita wasn't able to wait on him, and that he was going to have a talk with Homer and his wife as to why they couldn't take care of him (page 306); that he saw Mr. Watts and talked with him two times before he went to visit the daughter, but saw him at Homer's place after he returned, at which time Mrs. Carden was present, but he does not remember the day of the week, or month he first saw him there; that when he saw him he said, "Hello, Uncle Tom, you are home again," to which Watts replied **[180]** "Yes, I have come back, Dave; I think there is some show now for Homer; Marvel told me that George Carmichael had joined the church; I think if he has there is a chance for Homer," and further told him that Homer had gotten a room for him and a nurse to wait on him. That they talked about other things (page 308); that Mr. Watts told him he was a little tired and further said, "I have been out riding; Homer taken me out riding. We started out to the ranch but didn't get out there though. I am a little tired but think I am all right after I get rested up" (page 308); that this conversation with Mr. Watts was in the afternoon; that he told Mr. Watts he had a chair and big can made for his mother-in-law and that he would have it sent to him and that Mr. Watts said he wished he would do so. (Page 309.) That he saw him again in a day or two at which time Mr. Watts said to him, "I sent for Lizzie to-day and she came down

(Testimony of David Taylor.)
and I told her if I had ever done her any harm or wrong I was sorry of it and asked forgiveness and she said she would forgive me," and that Watts further said that he told her if she didn't have plenty to keep her as long as she lived he would make arrangements, and that he further said, "Marvel told me she had plenty and Homer told me she had plenty." He said he didn't know how long he would live. "None of us are going to live very long; we are all getting old." That he went to see Mr. Watts at Homer's place, he thinks, three times, and the last time—on Sunday—he was "out of his head" and that he did not attempt to talk to him, only stayed a minute or two and that Watts died within a short time thereafter (page 311). **[181]**

(Examined by COURT.)

"Q. That was the second talk you had with him that he spoke about his wife after he came down?

A. Yes, the second time after he came down from Palouse. The first he was just talking about other things. (Page 313.) That he saw him no more after that day until he saw him in his coffin. That he and Mr. Watts used to attend church together. That Watts told him at one time his brother raised his girl (Jerusha); that she had a good start, a good deal of property, and that the boys had helped to make his property, stayed at home and worked, and he thought that she was not entitled to as much as the boys and that it was not necessary to give her much of his estate (page 314). That he could not see any difference in the condition of the mind of

(Testimony of David Taylor.)

Mr. Watts except that, he supposes, his mind was growing a little weaker as his body did; that he seemed to have "just as good a mind as he ever had, to my notion"; that it took Watts a little longer to get at anything and express it but that he talked just as rational as he ever did, and that this condition was true the day Watts told him he had taken a ride with Homer and was also true of his other conversations he had with him (page 315). That three or four years ago he heard Mr. Watts say Marvel's child was crippled and that he wanted to help the child and had told Marvel to spend his money in doctoring her and that he (Watts) was going to help her. That he had also heard Watts say that Marvel's wife "would crawl up the stairs on her hands and knees to wait on him" when she was not able to do so and that she would do everything she could as long as she had strength. (Page 316.) **[182]**

On cross-examination he testified that Mr. Watts told him he didn't consider that Jerusha should have an equal share in his property and that, as he remembers it, told him he had given her $500 in the will and divided the balance of the property equally between the boys. (Page 316.)

"Q. Didn't he tell you whether Jerusha was good to him or not?

A. Oh, he said all the children treated him well; that is all except Homer; Homer didn't treat him well.

Q. He said she treated him well?

(Testimony of David Taylor.)

A. Yes; he said he was going up to see her and stay with her a while.

Q. He said she was good to him?

A. Yes, and waited on him.

Q. He seemed to like his daughter Jerusha, and he seemed to like Mrs. Marvel Watts, and he seemed to like the little girl? A. Yes.

Q. Now, he told you in that same conversation about the will, didn't he, that his daughter Jerusha didn't get really near as much as had been expected out of her uncle's estate.

A. I don't know if he told me that time or not but he must have told me—I don't know who else could. It seemed like—I don't know but what it was you, Judge; I don't know but what it was you told me, or that girl's husband that lives in Palouse; what is his name—Crabb. Somebody told me. Whether it was Uncle Tom or you or that other man, that after he adopted this child—he adopted two other children of some one, and they divided up and didn't get as much. I don't know but what it was the night that I talked with you and Crabb.

Q. Well, now, didn't you tell us that?

A. Well, if I did, Uncle Tom told me that but I think it was maybe you told me. [183]

Q. Didn't you tell us that—didn't you say that he told you that his brother had adopted and raised his daughter? A. Yes, that is what I said.

Q. That he promised to give her all his property—make her his heir, but afterwards adopted two other children and so she only got one-third; isn't

(Testimony of David Taylor.)

that what you told us that he said?

A. Well, I ain't sure about that, whether I told you that or you fellows told me that.

Q. You don't remember about that?

A. No; you got what I said, you know; you wrote out part that night.

Q. Yes, I know, and I read this over to you and you said that was right, didn't you?

A. That is the way I had it in my head, yes.

Q. You don't remember; your memory is not very good, is it? A. I think it is average.

Q. Well, you don't remember now.

A. Well, if I did, just as I said here a minute ago, Judge, I said Uncle Tom told me, or you, or that gentleman, but I am not sure which one. Now, Uncle Tom might have told me that.

Q. You don't remember whether he told you or we told you?

A. No, I couldn't say that; there were so many different conversations.

Q. You have talked with all the attorneys pretty nearly in the case? A. I think I have."

"Q. At different times?

A. Yes." (See pages 316–7–8.)

That Watts told him all of the children were good to him except Homer, and that he had also heard Mr. Watts say regarding Homer, "Didn't see how in the world he raised a [184] Republican Boy," and that witness also heard John Crabb, one of the plaintiffs, say that he had witnesses to prove they would not believe Homer on oath. That Mr. Watts

(Testimony of David Taylor.)

told him that if Homer did not change his way of doing he would change his will, would see Homer and have a talk with him (page 321); that Mr. Watts was 82 or 83 years old when he died; that he was weak but seemed to be in good spirits and moved about the room when he saw him upon his return from California the last time in March, 1914; that his mind seemed to be good, had rheumatism in his hand; that he never saw Watts try to walk after his return from Jerusha's but one time and that was at Homer's house— "he walked around to the foot of the bed and then back, kind of crawled around" (page 325), by holding on to the bed and by witness also holding him—could not walk without help, had grown feebler.

"Q. He had grown more feeble when you saw him the last time? A. Oh, yes, feebler all the time.

Q. Yes, getting more feeble and lower all the time? A. Yes, sir.

Q. And he continued to get gradually lower until he died?

A. I suppose so, yes." (See pages 325–6.)

That Watts told him he was tired, had been out automobile riding, started out to the ranch but didn't go all the way.

"Q. Now, you say that the first time you saw him after he came back was the day when he said something about having been automobile riding?

A. Yes, sir—it was a day or two days after when I had the next talk." (See page 326.)

Had a talk with him a day or two thereafter in

(Testimony of David Taylor.)
which Watts told him he had had a talk with his divorced wife (page 326); that Watts was deafer than witness and witness is hard of [185] hearing but that Watts had a strong voice and witness had no trouble in understanding him; that he liked to talk over old times.

Testimony of F. S. Le Grow, for Defendants.

F. S. LE GROW, cashier of the First National Bank of Athena, connected with that bank fifteen years, forty years old, testified that he knew T. J. Watts who was in the habit of doing business at his bank; that Watts largely conducted his business with witness; that his bank never had held but one mortgage against Watts and that it was paid after his death, but prior to his death Watts himself paid the interest on it—the note dated September 3, 1904, in the sum of $3,000 with interest at 6½ per cent (page 331); that Watts paid the interest on the note himself in 1913 by check dated September, 191*6*, in the sum of $210, witness writing the body of the check and Watts signing his own name to it; at that time no part of the principal had been paid (page 332). Witness also identified about eighty-two other checks, the larger part of which were drawn by the said T. J. Watts (page 334); that Watts was capable as far as he knew, that he couldn't say that he was a man that was easily influenced (page 335). That Marvel Watts gave him some deeds to have recorded about the time of the death of T. J. Watts and that he "evidently mailed them" as he was ac-

(Testimony of F. S. Le Grow.)
customed to mail deeds from his bank to the county recorder to have recorded and that to the best of his recollection the deeds given to him by Marvel Watts were sent from his bank to the county recorder for record. (Page 336.)

"Q. Did you examine the deeds at that time?

A. No, sir.

Q. Would you know them now?

A. I don't think I would. **[186]**

Q. Do you know whether that was prior to the death of T. J. Watts?

A. Well, I don't remember; I know it was along about that time.

Q. Have you any recollection of his giving you any further deeds about that time to be recorded?

A. No.

Q. What did you do with these deeds?

A. Why, I had them recorded. I evidently mailed them; that is the way I am accustomed to whenever we have any deeds or instruments to be recorded. We mail them to the county recorder and attach a little check usually for who is to pay the recording charges, and the recorder records them and returns them to us, and cashes the check at his local bank."

On cross-examination he testified that he did not remember the date when he sent the deeds to the County Recorder and does not remember the date of the death of Watts; that after the death of Watts, Marvel Watts, administrator, paid off the $3,000 note and mortgage, if he remembers correctly, on

(Testimony of F. S. Le Grow.)

the 13th of November, 1915; that he had talked with Watts at different times regarding his business affairs but does not remember any of the circumstances.

"Q. Now, you say that you mailed two deeds for recording that were handed you by Marvel Watts?

A. Yes, sir, I said that I presumed that I mailed them. I usually do. I am pretty sure that I did these; very seldom that I would take them down.

* * * * * * * * *

Q. Upon what day did he hand you the deeds that he did pass to you? A. I don't remember.

Q. Was it before or after the death of Mr. Watts?

A. I couldn't tell you that. I remember it was about that time. **[187]**

Q. Did you receive them back?

A. I think we did.

Q. After they were recorded? A. Yes, sir.

Q. Did you make a charge in this account for that?

A. Well,—no—we made no charge in that account.

Q. Did you make a charge against the account of Marvel Watts?

A. Well, I could not say. I presume we did; we always do.

Q. Have you got that record with you?

A. No.

Q. Will you produce it?

A. Well, if I can find it I will. It was bulky you know. We might have balanced the account and returned the vouchers to whomever it was charged to and I would not have it.

(Testimony of F. S. Le Grow.)

(Note: It was not offered in evidence and there was no further explanation.)

Q. Well, have you got a copy of the letter transmitting those particular deeds?

A. I don't remember sending any letter. We just enclose that in a bank envelope with a blank check with a notation who is to pay the recording on the check. The recorder fills in the check for the amount of the recording, cashes the check and returns it to us in the usual course of business, and we charge it to the customer, whoever it belongs to."

That he is positive he had the two deeds given to him by Marvel Watts in his possession about the time of the death of T. J. Watts, and that Marvel gave them to him in the bank; that Marvel and other people had often asked him to have instruments recorded. That he received a letter from Mr. Parker responsive to which he forwarded a document to Mr. Watts at St. John, Washington, with which he sent a receipt for T. J. Watts to sign, which was signed, in his own handwriting, dated [188] March 27th (page 348). (Receipt received in evidence.) That he has no personal knowledge of how the will came to be at his bank but that he sent it to Watts on the 25th of March. (Page 349.)

Testimony of Dr. Samuel F. Sharp, for Defendants.

Dr. SAMUEL F. SHARP, resident of Athena, Umatilla County, Oregon, since the spring of 1879, engaged in the practice of medicine at that place ever since that time, graduate of Jefferson Medical Col-

(Testimony of Dr. Samuel F. Sharp.)

lege of Philadelphia, testified that he had been acquainted with Thomas J. Watts ever since about the first year that he (witness) located at Athena; knew him well; treated his family the greater part of the time up to his death; that Watts was frequently about his office; remembers the occasion of Watts return from California in the spring of the year 1914 but did not see him until he returned to Athena from the State of Washington when he saw him at the home of Homer Watts about the 12th of April, at which time Watts was very feeble, weak and exhausted, suffering from a general breakdown and that he did not talk to him very much that day; "that he was so hard of hearing I couldn't talk to him." (Page 354.) Saw him every day thereafter until his death, saw no change in him until the Thursday after he had been out in the automobile after which pneumonia gradually set in and caused his death; that Watts always knew him and recognized him during that time, but that he didn't converse with him; he didn't say very much" (page 355). That he did not notice any difference in his mind from what it had been a year or two before that time, and that he seemed rational "perfectly rational"; that he noticed Watts was perfectly rational up to about Friday"—Thursday or Friday —Friday, **[189]** I think," before his death, when he became delirious and gradually grew worse; that he was there probably twice on Saturday and twice on Sunday. That Watts told him Homer wanted to take him out automobile riding but that he did

(Testimony of Dr. Samuel F. Sharp.)
not want to go and that he told Watts it was pretty cold for him to go and that he was hardly able to go "and that if he didn't want to go, I wouldn't do it (page 356)," and that "it was too cold anyhow," but he went. That he had heard Watts speak about what he was going to do with his property in the latter part of his life and that he would speak about giving it to the boys except a little he was going to give to his daughter (page 356), heard him speak about it several times during the last years before he went to California. That Watts did not like Homer and wife very well—thought they had not treated him quite right and would often speak to witness about it. (Page 357.) That Watts made his home the latter years of his life when in Athena at Marvel Watts, and that he had treated him at that place. That on Thursday or Friday after Watts had been out automobile riding he commenced to cough, but up until that time "his mental condition was good"; that Mr. Watts never talked to him about the deeds or mentioned them (page 358).

Upon cross-examination he testified that Watts was suffering from a general break down.

"Q. Doctor, you say that he was suffering from general breakdown when you first called on him—old age? A. Yes.

Q. He was a very old man, wasn't he?

A. Yes, he was past eighty, I think.

Q. And in a feeble and senile condition?

A. Yes, he was feeble—very feeble. **[190]**

Q. General breakdown?

(Testimony of Dr. Samuel F. Sharp.)

A. General breakdown." (Page 360.) That he did not notice any symptoms of pneumonia when he went to Homer's house to see him; that he never saw him out of bed all the time he was there (page 360); that Watts was very hard of hearing and that he did not talk with him a great deal. "You had to halloo to make him hear" (page 360). That Watts could talk very good but on account of being deaf could not understand others very well; that he gave Watts a heart stimulant and nerve sedative until he developed a cough and thereafter gave him expectorants (page 361); that Dr. McIntyre had left some medicine with Watts, heart stimulants—strychnine in tonic doses—and he continued the same treatment (page 361), giving him also as he remembers it, bromides for sedatives as Watts was very nervous and restless when he first saw him, and that when he first saw Watts "I thought at first that he probably would get up again," and that the purpose of the stimulant was to "brighten him up" and that a stimulant of that kind does brighten one up more or less for a while, but that he did not give it to Watts "very strong"—large doses.

"Q. Was it on Tuesday the 14th that he talked to you about the automobile ride? A. Yes.

Q. And he talked to you in the morning about it and said Homer wanted to take him for an automobile ride but he didn't want to go?

A. Yes, it was too cold.

Q. It was too cold, and you told him you didn't think he was hardly able?

(Testimony of Dr. Samuel F. Sharp.)

A. I didn't think he was hardly able and it was very cold.

Q. You didn't think it was best for him to go?

A. No, I didn't think it was best.

Q. Now, Doctor, when you saw him there at these times he **[191]** didn't seem able to get up, did he?

A. No, I don't think he did, hardly. I never saw—I don't think he tried to while I was there."

That he did not see Watts out of bed at any time during his sickness; didn't have good use of his arms and legs; that if he remembers correctly Watts was not quite as well the next day after the automobile ride—had taken cold and began to cough and failed rapidly thereafter (364). That Watts was "all right" Tuesday but was not so bright the next day. That Watts talked with him many times about his property, several years before he died and up until before he went to California the last time—would come to his office in the summer before he went to California the last time and often speak about his property (page 365). That he did not see Watts after he went to California until he came back to Athena from Washington; that Watts always spoke well of Jerusha, said she always treated him kindly, never heard him speak unkindly of Jerusha in his life nor complain of her treatment of him, knew he was going up there to visit her pretty often (page 366). That during his last sickness he was nervous and shaky all the time and did not have good use of his right hand but that he thinks Watts could prob-

(Testimony of Dr. Samuel F. Sharp.)

ably have written his name. That he thought when he first saw Watts after his return from Washington he would get up again and did not change his mind about it until the cough developed. That he never heard or knew anything about the deeds until after the old gentleman's death. (Page 366.) [192]

Testimony of Marvel Watts, for Defendants.

MARVEL WATTS, forty-three years old, testified that he was born and raised in Umatilla County; married in 1899; has one child, Vernita, sixteen years old, who has been in poor health several years. That he made his home with his father and mother twenty-five years, worked on the farm when not in school and is now a farmer and manager of the Preston-Schaffer Milling Company since January 1, 1905; that his father went to California in the fall of the year 1913 and that he himself went to California and brought him to Athena the latter part of February, 1914, where he remained until after the middle of March when he took him to Jerusha Crabbs, staying there with him over night; left him there, came home, went back to Jerusha' the 3d day of April, 1914, with his mother, wife and Vernita by automobile, getting there Friday evening, and remaining himself until Monday morning when he came home and then went back again, remained over night, brought his father home with him—brought his father home for several reasons—because he was not satisfied with the treatment he was getting and Dr. McIntyre thought it would be best to take him away

(Testimony of Marvel Watts.)

and that John Crabb told witness and his mother that "it looked like the relatives were dumping all their old people off on him to take care of"; that his mother couldn't stand that remark; that immediately after his father and mother were divorced they became friendly with each other and their relations were very pleasant and that they very frequently visited with each other at his home.

That the two deeds executed by his father conveying the property to Jennie Anderson Watts and Vernita Watts, his wife and daughter, were first seen by him on the 15th [193] day of April, 1914, when Homer gave them to him for a while and he gave them back to Homer, and asked him to have them recorded; that he did not see the deeds any more until Saturday morning following, when Homer gave the deeds back to him, telling him he had forgotten to have them recorded; that he then took the deeds to Mr. Le Grow at the bank that Saturday, in the morning (page 374), and, before his father's death, asked Le Grow to have them recorded, and that his father died the following Monday, 20th of April; that he did not see the deeds any more until a few months thereafter; that on Thursday afternoon after the execution of the deeds he went to Homer's house to see his father and that his father asked him if Homer had given the deeds to him and when he told him Homer had done so his father said he hoped everything was satisfactory and that "Homer promised there would be no trouble over it." That before the execution of the deeds he never talked with his father

(Testimony of Marvel Watts.)

but very little—but once—about his property as he can remember it, and that was the summer before he went to California when his father asked him what he thought of remembering the wife of witness and also spoke about the mother of witness. That when he was at Jerusha's home while his father was there, he saw W. D. Parker there on two occasions; that he had known Parker ever since he was a little boy and that Parker had assisted him in changing his father's clothes one morning when they were getting him ready to bring him back to Athena, at which time his father smelled "very bad"; that he had had telephone conversations with Dr. McIntyre on the 7th of April and also on the 9th of April between Athena and St. John. That he does not recall his father saying to him in the presence of [194] Mrs. Crabb or Mrs. Wheeler or any other person, "Marvel, if you want to take me back to sign any papers I will not go," or any words to that effect, and that he did not say in his presence, "I have burned the will and want all to share equally," or any words to that effect"; and that his father did not say in his presence at any time or at any place, "On my word of honor, there will be no papers about any property when I go back," or any words to that effect, and that he did not see his father take hold of the hand of John Crabb and hear him discuss with Crabb or say anything to Crabb or any other person about signing any papers or disposing of any property or any words to that effect (page 379); that he did not at the depot at St. John, or at any other place or time

(Testimony of Marvel Watts.)

say to Jerusha Crabb, "Jerusha, don't worry. The property will be divided equally," or any words to that effect, and had no conversation with her at all about the disposition of his father's property until after the death of the father; but after the death of the father when Jerusha was at Athena, she said to him, "I suppose you will be appointed administrator," and I said, "I don't know." (Page 380.) "If you are, wind it up as quick as possible," and that she further said she did not want it dragging along like her uncle's estate; that he never did have conversation with Jerusha Crabb at any place in which he said to her that his father was not satisfied with his will and for her to get the will and destroy it or that Homer had not been good to his father or any words to that effect. That he took his father up to Jerusha's in 1914 because she had written for him to come and he wanted to go; that when he took his father up to Jerusha's the condition of his mind was "just the same [195] as it always was," and while on their way up there his father showed him where he used to run sheep and that he noticed no difference in the mental condition of his father; that when he went up to Jerusha's on the 3d of April, 1914, with his wife, mother and daughter, his father was on the couch asleep but woke up and was stupid and that when they all spoke to him his father said, "Where is Homer"; that his father sat at the table that evening and ate his dinner but did not talk very much but recognized him, his wife, mother and daughter; that about midnight that night *Mr.* McIn-

(Testimony of Marvel Watts.)

tyre was called and also Dr. Mitchell of Colfax came about eight o'clock in the morning.

"Well, they gave him some chloroform and drew his water, and daddy got easy right away and went to sleep. About that time Bill Parker came up there and I got in the car and went down to St. Johns, and I came back to Bill's and visited with Bill nearly all day. I then went back up to St. Johns in the evening.

Q. Well, now, go ahead and tell what, if any, conversations you had with your father there, and state any other facts that led you to believe or know the condition of his mind.

A. Well, that day you see I was not there much. In fact I never talked to Daddy a great deal while we were up there, because he was in a whole lot of pain that day, and Saturday, yes, Saturday and Sunday—Daddy told me when they had used that catheter they had hurt him and it hurt him very much to urinate. He thought it would be all right in a day or two." That when he went back to bring his father home "mentally I didn't see anything the matter with him at all. His physical condition, of course, was not very good." (Page 384.)

Q. Did you ever have any talk with Jerusha about a will on [196] either of these trips?

A. The first time was all. Well, when we went up there the second time, Jerusha told me that he had burned his will that morning about the way she related it here on the stand."

That he never did talk with his father at any time

(Testimony of Marvel Watts.)
with any intention or effort to influence him to dispose of his property in any manner, and that there is absolutely no understanding between him and Homer regarding a division of the property; that his father looked after his own business the last few years of his life except that he would sometimes have witness and Fay Le Grow to do a few things. (Page 385.) That he and Homer had been farming their father's land the last few years under a lease from their father, paying him one-third rental; that he and Homer were running the land and a lot of lands he had on the reservation together (page 385); that his father did his own banking business; that at one time his father had $3,000 borrowed from Stella Anderson, sister-in-law of witness, and paid to witness $2,000 thereof to be applied on the debt. That he never did have any talk with Homer Watts in regard to procuring the execution of the deeds or any one of them and that there is no understanding whatever between himself and Homer about a division or sharing in the property described in the deeds—absolutely none. It was agreed that the rents and profits up to date should stand as set forth in defendant's answer. (Page 396.)

Upon cross-examination he testified that he was the manager of and the owner of a part interest in the mill at Athena—owned eighty shares; that he and Homer farm several hundred acres of land in partnership and that he himself owns several hundred acres of land in his own right—that [197] there were one thousand shares of the milling company at

(Testimony of Marvel Watts.)

the time of his father's death; that the capital stock was $100,000, and that there was a large surplus; that at the time of his father's death he and his brother were farming 240 acres and 160 acres on the Reservation—his place of 200 acres making 600; Homer's place of 130 making 730, and 160 of his father's and the 160 they purchased from his mother in partnership; that at the time he owned individually 240 and 40 acres of land worth about $20,000; that the land they had in partnership they gave $11,000 for; that he owned ten shares in the bank; that at the time of his death the wife owned the home in Athena and the house and lot in Walla Walla and twenty shares of the mill stock.

Q. She had just a few years before that inherited from her sister a large amount of life insurance, hadn't she?

A. No, there was my wife and three brothers, and there was $20,000 of life insurance. My wife gave them $3,000 a piece and paid all the expenses.

Q. She got the balance?

A. She got the balance.

Q. So that she got out of the life insurance about $11,000? A. No, about $3,500.

Q. Did you say there was $80,000 life insurance?

A. There was $20,000 and she divided twelve; that is four thousand apiece—I think $12,000 she gave the boys.

Q. Well, now if you are right about that and it was $12,000 she gave the boys, that would still leave her $8,000 wouldn't it?

(Testimony of Marvel Watts.)

A. Yes, if there was no expense.

Q. Even at that figure? A. Yes.

Q. Now in addition to that did she inherit his mill stock? A. Yes, sir.

Q. And did she inherit this house and lot in Walla Walla? [198] A. She did.

Q. Now, she had practically all of that at the time he died, didn't she? A. Yes, sir."

That Vernita Watts is his only child. That before he went to California for his father he received a telegram from Tom Page and perhaps also a letter from Jerusha Crabb; was gone about a week or a little over on the trip after his father the latter part of February or the first part of March; that he took his father up to Jerusha's about the 16th or 17th of March at his father's own request and stayed there himself over night, slept in the room with his father, came home, went back, again the third of April with his wife, mother and daughter by automobile, came back home on the 6th, stayed longer than he intended on account of rain, went back again the 10th or 11th and brought his father home.

(The Court at about this juncture of the cross-examination of the witness appointed Miss M. A. Fleming Special examiner to take the balance of the testimony in the case, whereupon she was duly sworn as special examiner to take and report the balance of the testimony.)

Q. Now, when you got back to Athena did you tell your brother Homer that you had learned the will had been destroyed?

(Testimony of Marvel Watts.)

A. I don't remember; I possibly might.

Q. You and he talked about your going back up there and bringing your father down, didn't you?

A. Yes, sir; that was about, I think the day before I went after him.

Q. And had you made arrangements for a nurse, you and him? A. No, sir.

Q. And a doctor? A. No, sir." [199]

Then upon further cross-examination Marvel testified that his wife and his mother were present at Crabbs when Jerusha told him about the will having been burned the same day they got there. That there were several neighbors living in the vicinity of his house and Homer's house in Athena. (Page 408.)

"Q. That there were six other houses in the same block with Homer's. One within from one hundred to one hundred and fifty feet; that it was a small town and everybody neighbors." (Pages 407–8.)

That when he was at Jerusha's on the 3d of April his father came to the table in the evening, had a pretty severe pain in his leg but that he himself did not suggest bringing his father to the table; that his father did not eat very much, sat at the table possibly five or ten minutes. Don't remember how he got to the table; some of the folks helped him to eat. He sat there five or ten minutes and then some one helped him to bed. (Pages 410–12.) That his mother and wife were present when John Crabb made the remark about "dumping relatives" (page 413.) That John Crabb did not object to his taking his

(Testimony of Marvel Watts.)
father away but Mrs. Crabb said she didn't think he was able to be taken away, but did not object to his being taken away when he told her the doctor said it was all right; that at first his father said he wasn't able to go and that witness told him he was, and he asked witness what the doctor said about it.

Q. Now, you insisted then on taking him away, did you? A. Why, I went after him, yes.

Q. What say? A. I went up after him.

Q. Well, I say you insisted on taking him away?

A. Well, I did take him away. [200]

Q. And in nine days afterwards he was dead?

A. Yes, about that." (Pages 414–15).

That his father died in about nine days after he took him away; don't remember saying to Parker the morning he took him away that they did not want him to take him but that he was going to take him. If he did he does not recall it. (Page 415.) That it is seven or eight miles from Jerusha's home to St. John and from St. John to Athena probably one hundred thirty or one hundred forty miles; that they left John Crabb's house about ten o'clock in the morning and got to Athena about four in the afternoon, coming on the train and that he and Dr. McIntyre rode in the baggage-car with his father; that Jerusha came with them to the train but that he had no private talk with her; no talk with her about property; don't recall any talk about property. (Page 421.) That from the depot at Athena to Homer's house is probably four or five blocks and that when they got to Athena his father was taken to

(Testimony of Marvel Watts.)

Homer's house in a dray; that he thinks they carried him to the dray and from the dray to the house; that Homer helped. (Page 422.) That the property his wife inherited from her sister was from the Preston estate, as she had been married to Dale Preston who died several years after they were married and that Mrs. Preston died about three months after her husband died. That in 1913 there was no other mortgage on his father's property except the $3,000 and had not been for several years and that his father knew in 1913 that the $3,000 mortgage had not been paid off.

Witness having explained that there had not been any other mortgage except the $3,000 for a good many years before 1913, was asked: **[201]**

"Q. So it is perfectly plain from this letter that in 1913 your father thought that mortgage was about all paid off, ain't it?

A. No, sir, he knew it was not paid off, that $3,000 mortgage.

Q. Well, then he must have been crazy, mustn't he?

A. Well, Judge, I believe I can explain that two thousand dollars, my own ideas.

Q. All right, if you think you can, explain it now. You couldn't when Mr. Raley was asking you about it, but if you can now go ahead.

A. I believe I can, but I don't know. It was started yesterday and was stopped, but this fellow Skelton bled Daddy to a finish. Not only that but he put up a badger game on father and wanted ten

(Testimony of Marvel Watts.)

thousand dollars out of father. They finally compromised the thing for twenty-five hundred dollars and father came with this fellow down to Walla Walla to get the money; didn't want to pay it in Athena because he didn't want us boys to know. That was before he and mother were separated. Mr. Burford asked father what he wanted with the money. He 'fessed' up then what he wanted with it. Mr. Burford sent right over and got Mr. Sharpstein an attorney, and Mr. Sharpstein told this fellow here that he would have him behind the bars in fifteen minutes. So Daddy finally insisted that they give the man two hundred and fifty dollars and pay him for his trouble, and they did. Mr. Burford told Mr. Le Grow and Mr. Le Grow told me. Then father told me before this happened that this fellow was treating him. Father came down from Spokane, and as I remember it, this fellow Skelton wanted eight hundred **[202]** dollars to cure him. Father took some money and went back up to Spokane. I don't know how much he did spend that winter—probably a thousand dollars; but a little after that a letter came to Athena to my father. Father wasn't there—I don't know where he was but I remember this incident, so curious like I opened the letter. It was from Emma, and Emma says, 'We want you to send us three hundred dollars; you remember that I only got two hundred and fifty dollars out of that other affair and you (father) promised me twenty-five hundred dollars. And my father was an honest man. Now, I actually believe that father gave this

(Testimony of Marvel Watts.)

fellow money after that and I think that is what he refers to in that two thousand dollars there. I think it was my father's full intention to pay that twenty-five hundred dollars as he promised that fellow.

"Here counsel for plaintiff moved to strike out all of this answer of the witness as being voluntary, not responsive to the question and immaterial and incompetent, and based upon hearsay.

"Objected to by counsel for defendants upon the ground that counsel for the plaintiff asked for it. That the explanation was called for by counsel and the witness was asked to make any explanation that he could.

Plaintiff's Exhibit 9 read as follows:

Plaintiff's Exhibit No. 9.

Athena, June 16, 6 mo., 1913.

Dear Daughter and Family:

I got your letter the other day well it is wet and cold down here crops never looked better farmers is in sperits over the prospect of a good crop Marville have in fall wheat a bought 500 acres 120 of that is on my place and 187 acres on my [203] place is summer folowed I payed off $2000 last fall just before I went to California and I owe $1000 this is the last of my debts which accurd whilst the boys was sick before they died. well I have been lame with rhumates in my feet and rite rist this spring but am geting better now think will come up some time this summer do not know at what time I got a letter from a man by the name of Tabor says

(Testimony of Marvel Watts.)
he is my nep he has bin a round spocan for 10 years but has just herd where I was so I want to see him this summer when I come up to that country my eyes is yet some sore.

T. I. WATTS
JERUSHA.

That his father told him he paid Skelton $250; that his father never told him that he ever paid any other money than the $250 on that account.

"Q. Now, do you claim that there was ever a mortgage to secure any money that was paid in relation to the Skelton matter?

A. No, sir, I don't claim there ever was a mortgage for that.

Q. Now, in this letter of your father's it says, 'I paid off two thousand dollars last fall just before I went to California and I owe a thousand dollars. This is the last of my debt which accrued whilst the boys were sick before they died.' Now, when was it the boys were sick and died?

A. As I remember it one died in 1898 and the other in 1899 or 1900."

That along about that time there was a great deal of sickness in the family. That he does not know whether his father continued to go back to Shelton's every year after he paid the $250 or whether he went back at any time [204] after that but does remember his father was at Kennewick as he thinks he sent him some money to Kennewick but did not know he was taking electric treatments at Kennewick nor that Skelton was giving them; that his

(Testimony of Marvel Watts.)

father had the trouble with the Skeltons before his father and mother were separated as he remembers it; that he got one letter from his father written at Santa Ana, California, dated January 24, 1914, and another dated December 31, 1913 (page 444), got other letters from his father nearly every week but cannot find them as it is not his habit to keep friendly letters. That he couldn't find the telegram on which he went to California for his father but he found the date which was February 28th (page 443); that after his father and mother separated his father spent two winters in California and may have spent three and may have spent four—that he does not know; and he spent about a month one winter in the Willamette Valley but he cannot say what year." (See page 449).

Having testified that in 1912 or 1913 when his father was taking treatment at Kennewick that his father told him that he was taking treatments from a fellow that had an electric machine, he was asked:

"Q. Well, did you ask him if it was the same fellow he had had the trouble with at Spokane?

A. I don't think so; I didn't know it or I wouldn't have let him go back." (Page 452.)

Q. Well, now if your father had thought anyone worked a badger game on him he wouldn't have gone right back to the same place, would he?

A. Well, I don't know what my father thought. [205]

Q. Well, now if he thought that man had put up a badger game on him he would not have kept going

(Testimony of Marvel Watts.)

right back there year by year would he—twice a year?

A. Well, I don't know whether he would or not. I don't know that he did.

Q. You cannot remember whether he did or not?

A. No, sir.

Q. You would have thought it very strange if he had, wouldn't you?

A. Well, evidently I would, yes.

Q. You would have thought it kind of crazy, wouldn't you, to do a thing like that?

A. No, it might not have been crazy. I probably wouldn't understand it." (Pages 453-4.)

In the year 1911, 1912 and 1913 under arrangements with his father the crops were divided at the warehouse and that his father generally came to the mill to settle and when the wheat was sold his father's part of the money was generally paid to his father and that possibly his father's share of the rent in 1912 was around $1,000 and for the year 1913 about $1,000. That he first knew about the deeds on the 15th of April and that he gave the deeds to Mr. Le Grow to have recorded. That he remembers seeing Judge Fee something like two or three months after his father died in the office of the witness at Athena and having a conversation with him. That he got the letter from 'Emma' right after the trouble in 1904 or 1905.

"Q. Now, then, in that conversation did you say to Judge Fee that you didn't know anything about these deeds in question until after your father's

(Testimony of Marvel Watts.)

death or words to that effect?

A. No, I don't recall that at all.

Q. Well, what do you say as to whether you said it or not. A. I don't think I said it. [206]

Q. Well, do you know whether you did or not?

A. Why, yes, I wouldn't say that because it wasn't true.

Q. You say that you know you did not say that to Judge Fee?

A. Yes, I am quite sure I did not. I don't know why I should say it." (Pages 463–4.)

The two letters—one dated Santa Ana, January 24, 1914, consisting of four sheets of paper signed by T. J. Watts, marked Defendants' Exhibit "K," together with the envelope addressed M. L. Watts, Athena, Oregon, marked Defendants' Exhibit "L"; and the letter dated December 31, 1913, together with the envelope marked Defendants' Exhibit "M" and Defendants' Exhibit "N," were introduced in evidence without objection. That after his father died he was appointed administrator of the estate and that Homer was his attorney; that the eighty acres of land sold for something like $4,000 or $4,100. That the debts including the mortgage at the time his father died amounted to $3,200 or $3,300; that the balance was eaten up by funeral expenses and the expenses of administration, including his own and his brother's fees, so that there was nothing left to distribute. (Page 470.)

Testimony of Homer I. Watts, for Plaintiff (Recalled—Cross-examination.)

HOMER I. WATTS, recalled for further cross-examination by the plaintiff, testified that after the death of his father he wrote a letter to Jerusha Crabb regarding eighty acres of land belonging to the estate.

Testimony of Samuel Hut, for Defendants.

SAMUEL HUT testified that he had been residing in Athena continuously for fifteen years; is married; fifty-nine years old; a drayman for twelve or thirteen years; lives [207] four or five blocks from Homer Watts; got acquainted with Thomas J. Watts, he thinks, in 1902, and that while Thomas J. Watts would be in Athena he would see him once or twice a week—sometimes maybe oftener—and knew him as well as he knew other old people around Athena; did dray work for him and remembers the occasion of Mr. Watts coming from Washington and being taken off the train at Athena, and also remembers seeing him on Main street in Athena in an automobile in front of Hawks' drugstore and had a talk with him, passed a few words (page 475); that Watts spoke to him as he always did; that at that time he also saw Byron Hawks, the druggist and Jack Vincent, a jeweler, about the same time; that Mr. Watts was sitting up in the automobile and that witness drove up close to him, leaned over to him and said, "How do you feel, Uncle Tommy?" and that Mr. Watts answered him as follows: "I feel fairly well.

(Testimony of Samuel Hut.)
I feel good. How do you feel, my boy?" That Mr. Watts always called him his boy; that Mr. Watts also asked him how his family was; that he never saw Mr. Watts alive after that day, but heard Byron Hawks talking to him about the same way that witness talked to him; that about the same time he saw Sam Booher and heard Booher ask Watts how he was getting along. That he did not notice any difference in the mental condition of Mr. Watts at that time than he had noted any other time, as Mr. Watts spoke to him as he always did and that there was nothing at all about his actions or his conduct or his language that indicated he was not perfectly intelligent and in good mental condition. "He appeared just the same that day as he ever did to me." That witness is not related to any of the parties. **[208]**

On cross-examination he testified that he first met Mr. Watts at a blacksmith shop in the year 1902 at Athena; that he helped Homer Watts bring Mr. Watts from the home of Mr. Watts to the home of Homer Watts about twelve years ago when Mr. Watts was crippled and had to be waited on; that he had also seen him at Marvel's house at different times; that he had not seen him for some time prior to the day he saw him in front of the drugstore; that he looked thin, but had always looked thin to him, and that Mr. Watts spoke to him and answered him that day just as he had always done; that he does dray work for the milling company and has done it ever since he has been in the business (page 485), and

(Testimony of Samuel Hut.)
for the Watts boys, but on redirect examination the witness testified this fact does not make any difference whatever in his testimony.

Testimony of B. B. Richards, for Defendants.

B. B. RICHARDS, forty-four years old, justice of the peace and city recorder at Athena since 1907, member of the Board of School Directors, formerly cashier of the First National Bank of Athena, testified that he became acquainted with Thomas J. Watts in the summer of 1899 and for several years, when Watts was in Athena, saw him almost daily; that he lives on the same street and in the same block that M. L. Watts lives on and in, their homes adjoining, and that Homer Watts lives about a block and a half away; that in the fall of the year 1899 he drew a will for Thomas J. Watts in Athena which was signed by him and witnessed by, he thinks, Bill McBride and himself; that he has written wills for other persons and **[209]** that the will for Watts was executed in the general way that wills are executed before him in the presence of two witnesses—as he remembers it; that when the will was executed, Mr. Watts took it, that witness has never seen it since and does not know what became of it; that in the will Mr. Watts gave to his wife a place in Athena or near Athena, a quarter-section of land, and gave to Jerusha Crabb a small sum of money, he thinks something like $100, and gave the remainder of the property to be divided equally between his three boys. At that time Mr. Watts had three boys living.

(Testimony of B. B. Richards.)
Thereafter in the year 1910 or 1911 he drew another will for T. J. Watts at Athena, which was signed by Watts and witnessed by Dr. G. S. Newson and himself; that Mr. Watts asked him and Dr. Newsom to subscribe their names as witnesses to the will, which they did; that at that time Mr. Watts and his wife had been divorced; that when the will was executed T. J. Watts carried it away and witness never saw it thereafter and does not know what became of it; has no copy of it, but remembers that he gave to Jerusha Crabb a small sum of money—the exact amount he does not remember, but that it was less than $500 and that the remainder of the property was given to Marvel Watts and Homer Watts, share and share alike, and at that time the mental condition of T. J. Watts was all right; that neither Homer Watts nor Marvel Watts was present at the execution of the will, and he did not have any conversation with any one of them about the execution of the will; that Mr. Watts was always positive and certain and his ideas were well defined and witness considered him perfectly competent. (Page 495.)

On cross-examination he testified he had maintained a [210] permanent residence at Athena since 1906, but went there the first time in 1899, taught school in that vicinity, then resided at Helix four or five years; has been living in the same block with Marvel Watts about seven years; that on one occasion Mr. Watts fell, and as he remembers it, dislocated one hip and was taken care of by Homer at Homer's house; that he knows positively Watts

(Testimony of B. B. Richards.)
left less than $500 to Jerusha in the last will he wrote for him; that he observed no difference in the mental capacity of T. J. Watts between the making of the first will and the time of making the second will. That he does not remember seeing Mr. Watts in the year 1914; that Mr. Watts could hear fairly well if he knew who was talking to him and looking straight at him.

Testimony of Dr. G. S. Newsom, for Defendants.

Dr. G. S. NEWSOM, a practicing physician since 1904, graduate of the University of Oregon, licensed to practice medicine and surgery in Oregon, testified that he was thirty-five years old; was acquainted with Thomas J. Watts in his lifetime; first met him at Prineville when witness was "just a young fellow"; that he moved to Athena in the year 1910 and was engaged in the practice of medicine and surgery and saw Mr. T. J. Watts as frequently as he would see other men in a small town and was present at the execution of a will by him in the office of B. B. Richards in the fall of the year 1910, as he remembers it; saw Watts sign the will, and that B. B. Richards and he subscribed their names thereto as witnesses; that witness himself read the will before he subscribed his name to it, but has not seen the will since that time; that he remembers the terms of the will—$200, as he remembers—was left to the **[211]** daughter and the remainder of the property was left to Homer and Marvel; that witness went away from Athena about the first day of May, 1913, and never

(Testimony of Dr. G. S. Newsom.)

saw Mr. Watts, as he remembers it, thereafter; that that at the time Mr. Watts executed the will in his presence his mental condition was as good as any other average man's (page 509), and that his mental condition thereafter when he would see him was apparently the same as it was at the time of the execution of the will—noticed no difference in him mentally; had several conversations with him around the hotel and other places in Athena and considered him at all times able to handle his own affairs; that at the time of the execution of the will to which he was a witness he did not see either Homer Watts or Marvel Watts and knows of no person influencing Watts (page 510.)

Upon cross-examination he testified that he was not present when the will was written but read it over before he signed it as a witness for the reason he never signs anything until he reads it over; that he got acquainted with Mr. Watts seventeen or eighteen years ago and did not see him after the month of May, 1913, as he himself moved away from Athena for a time then; that Mr. Watts was hard of hearing, had rheumatism, was getting childish, as old men do (page 513); was acquainted with the father of witness and would frequently ask about his said father. "We would always get a conversation out of Uncle Tommy and a little amusement by just starting him on the Blue Bucket Mines; I have heard him tell about them at least a dozen times, tell practically the same story every time." (Page 514.) [212]

Testimony of Jennie Anderson Watts, in Her Own Behalf.

JENNIE ANDERSON WATTS, one of the defendants, wife of Marvel Watts, testified that she had been married to Marvel Watts eighteen years; has one child named Vernita; had known T. J. Watts ever since 1899, and that he made his home with her and her husband the last six years of his life and was there on an average eight months out of each year; that late in life he had rheumatism and his feet and hands bothered him; that she frequently had to wash the back of his neck as he couldn't do that himself; that her daughter, Vernita, used to lace up his shoes as he could not do that very well on account of his fingers bothering him and that he thought a great deal of Vernita; that she heard him speak one time about changing his will and having left Jerusha $10 and that she herself told him he should have left Jerusha more than $10 and that he then told her he left her only $10 because one of his brothers took care of her when she was a child and had made her an heir; that his own boys had made most of his property and he didn't think it right for Jerusha to come in and take it from the boys after they made it. (Page 522.)

On cross-examination she testified that she thought Mr. Watts made his home with her and her husband on an average about eight months each year but she couldn't say how much of each year he stayed there; that he would go away and be gone sometimes three

(Testimony of Jennie Anderson Watts.)

weeks, a month, three months and four months but was at their home a part of the time every year and that she had known him to stay at Homer's; that her daughter Vernita has a very weak spine and had had sickness. [213]

"Q. Will you say that he was at your house and stopped at your house the year 1913, at any time after the month of September?

A. Well, I know he was at our house part of the time of every year from—

Q. That is not the question I am asking, Mrs. Watts. I want to know if you will say that he was at your house at any time during the year 1913 from the first of September on, to stay?

A. Well, I am sure that he was.

Q. You are sure that he was? A. Yes.

Q. Will you swear that he was there from the first of October any time in the year 1913?

A. I never thought of having to give certain dates, or I would have kept a diary of all this. I cannot tell you.

Q. You cannot tell? A. I cannot tell you.

Q. Will you swear that he was at your house in the month of May, 1913?

A. Well, I couldn't swear.

Q. Or June, 1913?

A. I couldn't swear what months.

Q. You wouldn't swear? A. No.

Q. Will you swear that there was not three months in the early part of 1913 that he was not there at all? A. No, I wouldn't swear that.

(Testimony of Jennie Anderson Watts.)

Q. Now, then, how long was he absent in California the last time? A. The last time?

Q. Yes.

A. He must have been down there the last time three or four months.

Q. Three or four months?

A. If I remember right.

Q. Well, now, didn't he go down there in the month of December?

A. Yes, the last of December. [214]

Q. Yes. Where was he stopping immediately before the time that he went down there?

A. Why, he was at our house.

Q. For how long?

A. Well, he had been there quite awhile, if I remember.

Q. How long?

A. How long had he been at our house?

Q. Yes.

A. Let's see. That was, you say, 1913?

Q. Yes.

A. Really I don't know just how long.

Q. Wasn't it a very short time?

A. It might have been. I don't remember of his being away just before going to California. He might have been.

Q. Hadn't he been over at Kennewick, Washington? A. Yes, he has been at Kennewick.

Q. During the month of October and November, and part of the month of December?

(Testimony of Jennie Anderson Watts.)

A. I don't remember of his being at Kennewick over a month or so.

Q. Over a month or so?

A. I think he was there twice, a month or so. He was taking treatments of an electric doctor, he told us.

Testimony of Will M. Peterson, for Defendants.

WILL M. PETERSON, of Pendleton, Oregon, testified that he is an attorney at law; came to Umatilla County about the first of March, 1902; went to Athena in the month of May, 1902, and remained until in 1907; was practicing law there; was acquainted with Thomas J. Watts; wrote a will for him on the 25th day of November, 1905, which was executed by him in the presence of the witness and one other witness and that the will was duly executed and carried away by Mr. Watts; that in the will Mr. Watts bequeathed to Jerusha Crabb the sum of $10, and left the rest of his property to his wife and two sons, Homer I. Watts and Marvel Watts. [215]

On cross-examination he testified that he kept a record of fees charged and that refreshing his memory from his record he wrote the will for Mr. Watts on the 25th day of November, 1905; that Mr. Watts either told him at that time or at some other time that his brother had raised his daughter Jerusha, and that the brother would make or had made some provision for her; that Mr. Watts had been in his office a large number of times. That at the time

(Testimony of Will M. Peterson.)
the will was drawn, Watts was living with plaintiff's stepmother and Marvel was living there in the same town, and Homer was east in school. (Page 532.)

Testimony of Mrs. Jane Carden, for Plaintiff.

Mrs. JANE CARDEN testified that she had been living in Athena about six years, had done some nursing, took care of Thomas J. Watts at the home of Homer I. Watts, beginning the 12th day of April, 1914, and continuing until his death which she thinks was the 20th of April; that his right arm during that time was perfectly useless but that he could use his left arm some; that she remembers the day he went out automobile riding on Tuesday—went between nine and ten and came back after dinner, and that he was "rational up to that time," and would know people when they came in, answered questions and asked questions in an intelligent manner, seemed to understand all that was going on around him.

On cross-examination she testified that Homer Watts made arrangements Saturday evening for her to come to his home and nurse his father and that she went there on Sunday morning about seven o'clock; that she slept in the same room and was with him all the time (page 538). That Mr. Watts was hard of hearing, almost deaf, and that one had to talk very loud to him to make him hear. [216]

Q. Now, when you got there where was he?

A. In bed.

Q. He was very old and very feeble, wasn't he?

A. Yes, sir, he was.

(Testimony of Mrs. Jane Carden.)

Q. And childish, was he? A. Yes, sir.

Q. Now, in taking care of him I suppose you changed the bed and gave him a sponge bath every day? A. Yes, sir, I did.

Q. You couldn't very well give him any other kind of a bath but a sponge bath, could you?

A. Sponge bath and alcohol bath.

Q. Yes. Well, you did, you gave it to him in bed?

A. Yes.

Q. He was not in a condition so you could take him up and put him in a bath tub?

A. No, you couldn't put him in a bath tub.

Q. Every day you gave him a sponge bath?

A. Yes.

Q. Now, with the exception of the time when he went out automobile riding was he out of bed at any time while you were there until he died?

A. No, sir.

Q. Never was? A. No, he was not out.

Q. He never came to the table at any time? He wasn't able to? A. No, not while I was there.

Q. Not while you were there? A. No.

Q. Not from Sunday morning until he died?

A. No.

Q. And on this day when he went out automobile riding, did they take him out of bed? A. Yes, sir.

Q. And who took him out of bed?

A. Homer Watts and I.

Q. Homer Watts and you?

A. I helped to put his clothes on.

Q. You helped to put his clothes on?

(Testimony of Mrs. Jane Carden.)

A. Yes, sir.

Q. Was there anyone else there besides you and Homer?

A. Guy Jonas was there and Mrs. Watts. **[217]**

Q. Guy Jonas and Mrs. Watts? A. Yes.

Q. Did Guy Jonas help to get him out of bed and dress him? A. He helped put him in the car.

Q. Well, did he help get him out of bed and dress him? A. I believe he did, yes.

Q. And he helped to take him out and put him in the car, did he? A. Yes, sir.

Q. And how long was he gone?

A. Well, I suppose he was gone over an hour; perhaps two hours—an hour and a half; something like that—I don't just remember.

Q. You told Mr. Hanna that it was about an hour or an hour and a half, didn't you?

A. Well, it might have been. It has been quite a while ago. I have forgotten nearly everything.

Q. That was when it was very fresh in your memory, when you were talking to Mr. Hanna, not very long after it happened, wasn't it? A. Yes.

Q. Now, you don't mean to say in relation to his mind—it was not like the mind of a young man, was it? It was like the mind of an old, feeble man?

A. Well, I suppose it was.

Q. You thought like you would expect in a man who was 82 or 83 years old, and very sick, wasn't it?

A. Well, he was very sick towards the last. He wasn't so awfully bad when I first went there.

Q. Well, I say his mind was about like you would

(Testimony of Mrs. Jane Carden.)

expect of such an old, sick person in his condition, wasn't it? A. The day I went there?

Q. Yes, and from that time on. [218]

A. Well, the day I went there he wasn't—he was pretty bright the first day I went there, on Sunday.

Q. Just about as bright as you would expect an old man in his condition to be?

A. Well, yes, he was pretty bright.

Q. What say?

A. He was a pretty bright old man; yes.

Q. Just about as bright as any old sick man would be expected to be? A. Yes.

Q. But he was very childish, wasn't he?

A. Well, I didn't talk with him very much, so I don't know anything about him being very childish.

Q. You could not tell very much about what was the condition of his mind really?

A. No, I never talked much with him.

Q. And you never had known him before?

A. I never knew him before till I went there.

Q. So that you really couldn't tell what the condition of his mind really was? A. No.

Q. Except that he could answer your questions?

A. He could answer my questions and ask me for what he wanted.

Q. Asked you for what he wanted?

A. Yes, that is all.

Q. You wouldn't undertake to say whether he was in condition to transact important business or anything of that kind? A. No, I couldn't.

Q. Now, on this time when they took him out in

(Testimony of Mrs. Jane Carden.)

the morning or forenoon of the 14th, that was, wasn't it—the 14th of April? A. Yes.

Q. Now, who was there when they brought him back?

A. Well, I was there and Mrs. Watts was there, and Winship, I think he was there. My little girl was there.

Q. Well, didn't Guy Jonas come there and help bring him in?

A. Well, I don't know who helped bring him in. I have forgotten. **[219]**

Q. Well, didn't you tell Mr. Hanna when this was fresh in your mind that Guy Jonas was there and helped bring him in?

A. Well, I don't remember whether Guy Jonas was there and helped—he was there when I came back, but I don't remember whether he helped bring him in or not. I don't just remember any more.

Q. He was there when you came back?

A. He was there when I came back from the ride.

Q. When you came back from the ride?

A. Yes.

Q. You don't remember whether he was there and helped bring him in or not?

A. I don't remember any more.

Q. But if you told Mr. Hanna that when it was fresh in your memory, that would be likely to be right, wouldn't it?

A. Why, I couldn't tell you that.

Q. You don't know whether Guy Jonas was there at that time or not? A. I don't remember.

(Testimony of Mrs. Jane Carden.)

Q. Was Mr. Crabb present when you talked with Mr. Hanna? A. I think he was.

Q. And then afterwards I came up there one day and you talked with me, didn't you?

A. I think you did sometime a long time after that.

Q. Yes, quite a while after that. And Mr. Crabb was with me, wasn't he, when we talked together?

A. Yes, I guess he was.

Q. Now, didn't you tell Mr. Hanna at the time that you talked with him, that when they returned (referring to Homer Watts and his father) Jonas was there and helped carry the old man into the house; he did not come in the auto; no one came but the old man and Homer? Now, didn't you tell Judge Hanna that in the presence of Mr. Crabb?

A. Well, I might have, but I don't remember it. [220]

Q. Now, didn't you tell me when I talked with you also in the presence of Mr. Crabb—didn't you tell me that day Homer came with the car; pretty soon Mr. Jonas came and they got the old man in the car and took him for a ride; they were gone about an hour; Mr. Jonas was there and helped him out. Didn't you tell me that in the presence of Mr. Crabb, too?

A. Well, I don't remember. I couldn't remember who helped him out of the car.

Q. You cannot recollect what you told us. Now, then, didn't you tell Mr. Hanna at the same time that you talked with him at the time I have interrogated you, when Mr. Crabb was present that is the

(Testimony of Mrs. Jane Carden.)

only conversation you ever had with Mr. Hanna, isn't it? A. That is all.

Q. That was at your house, wasn't it?

A. Yes.

Q. Now, didn't you tell Judge Hanna in the same presence, that "After they got back on Tuesday I put the old man to bed; in the afternoon Homer's wife took me out for a ride; she asked me to go; when we left the house Homer was there." Did you tell Judge Hanna that?

A. Homer was there, yes.

Q. Was that true?

A. When we went out for the ride, yes.

Q. And that she asked you to go?

A. Yes, she wanted me to go for a ride.

Q. What say?

A. She wanted me to go for a ride, yes.

Q. You also told Judge Hanna that she never asked you to go riding on any other day while you were there, didn't you?

A. Well, she never did on any other day.

Q. Well, I say you told Judge Hanna that she never asked you to go riding on any other day?

A. Yes, I did. [221]

Q. Now, in relation to that same matter, when you talked with me, didn't you say, after saying that Mr. Jonas was there and helped him out—didn't you say, "Before they got back Mrs. Watts asked me if I did not want to go for a ride when they got back, and I said I did not care, and when they came back we went for a ride, leaving Homer Watts, Jonas and

(Testimony of Mrs. Jane Carden.)

the old man there alone." Now, did you tell me that when Mr. Crabb was present?

A. Yes. How is that?

Q. Did you tell me that, I say?

A. About Mr. Homer Watts being there at the house with the old gentleman?

Q. Did you tell me that before they got back (referring to Homer and the old gentleman, Mr. Watts —old Mr. Watts), "Before they got back, Mrs. Watts asked me if I did not want to go for a ride? Now, did you tell me that?

A. Before they got back?

Q. Yes, before they got back.

A. I don't remember saying that. I said we went for a ride.

Q. Well, didn't you tell me that, before they got back, Mrs. Watts asked you if you didn't want to go for a ride?

A. Well, she asked me to go for a ride, but I don't remember just when she asked me that. We went out after they came back.

Q. You don't remember whether it was before or after? A. No.

Q. And you said you didn't care, did you?

A. Well, I said I didn't care.

Q. And when they came back you did go for a ride? A. Yes, we went for a ride.

Q. Yes. A. Yes, sir.

Q. Now, then, you were gone about an hour, weren't you [222]

A. Something like that, yes.

(Testimony of Mrs. Jane Carden.)

Q. And when you went away you left Homer Watts and Jonas there, didn't you? A. Yes, sir.

Q. And the old man? A. Yes, sir.

Q. And there was nobody else left about the house?

A. No, sir.

Q. Now, you didn't see any deeds or papers of any kind around there that day? A. No, I never did.

Q. When you got back from your ride that Mrs. Watts asked you to take, who was there then?

A. Well, I don't remember who was there when I got back. I remember Mr. Watts being there.

Q. Well, you told Mr. Hanna and myself that there wasn't anybody there when you got back, except Mr. Watts and the old gentleman, didn't you?

A. Well, that is what I remember.

Q. What say?

A. That is what I remember, Mr. Watts was there.

Q. That is what you remember?

A. Yes, Mr. Watts was there, that is Homer Watts.

Q. Now, you told me in the same conversation with me, about the same that you have told here, that you didn't know whether he was in condition to do business during the time that you were there or not, didn't you? A. Yes.

Q. Now, did you ever see any papers there or hear about his having made any papers, until after he was dead? A. No*w*, sir, I never did.

Q. If there were any deeds made there, you never knew anything about it or heard anything about it?

A. No, I did not.

(Testimony of Mrs. Jane Carden.)

Q. Now, since you talked with Mr. Hanna and myself, you have talked with a great many other persons about the case, [223] haven't you? They have asked you what you knew about it?

A. I don't remember of any.

Q. What say?

A. I don't remember talking to anybody else about it.

Q. Well, didn't Mr. Raley and Mr. Peterson ask you what you knew about the case?

A. I think Mr. Raley did.

Q. Well, that is what I mean. They asked you what you knew about the case and you told them just the same as you did Mr. Hanna and myself?

A. Yes.

Q. Mr. Raley and Mr. Peterson? A. Yes, sir.

Q. And did you talk in the same way about it, that is, tell Mr. Homer Watts what you knew about it, what you remembered?

A. Did I tell Mr. Homer Watts?

Q. Yes, did he ask you what you remembered about it? A. I don't think he did.

Q. Did Mr. Marvel Watts ask you what you remembered about it? A. No, he never.

Q. How many different times have Mr. Peterson and Mr. Raley asked you what you remembered about the case? A. Just the one time.

Q. Just one time? A. Just one time.

Q. When was that?

A. I don't remember. About two weeks ago, or three—something like that.

(Testimony of Mrs. Jane Carden.)

Q. About two weeks ago or three. Haven't you talked with them and told them about it since you have been here in town as a witness? That is what I mean. A. No, I have not.

Q. You didn't talk with them out here in the hall?

A. No, sir.

Q. Never said a word to them at all?

A. No, I never said anything to them.

Q. Have you ever been at Mr. Peterson's office since you have been here? [224]

Q. Or Mr. Raley's office.

A. I was there once.

Q. Oh, you were there once since you have been in town as a witness?

A. I went to see him to find out what time court sat.

Q. Who was up there when you got there?

A. Well, there was Mr. Raley and his son, and some stranger—I don't know who he was.

Q. Who?

A. Some stranger, I don't know who he was.

Q. When was that? What day was that?

A. Saturday.

Q. Did the old gentleman go out—did they take him out riding at any other time?

A. Not while I was there, they didn't.

Q. Not while you were there? A. No.

Q. Did Marvel Watts ever stay in the house all night while you were there? A. Marvel Watts?

Q. Yes.

A. I believe he did—sat up with him.

(Testimony of Mrs. Jane Carden.)

Q. What night?

A. Well, I don't remember. I think it was Saturday night—Friday or Saturday night.

Q. Before he died, Monday? A. Yes, sir.

Q. Before that time had he ever stayed in the house with him? A. Not all night.

Q. Now, did you, in all the time you were there, ever hear the old man talk about his property in any way? A. No, sir, I never did.

Q. Or about conveying it away, or deeding it away, or making any disposition of it at all? A. No, sir.

Q. You are not what they would call a trained nurse? A. No, sir, I am not.

Q. You never took a course in training?

A. No.

Q. You don't claim to be anything of that kind? [225] A. No, sir, I don't.

Q. You have a family, a little girl there, and you do most any kind of work that you can get, and nursing when you can get it to do? A. Yes.

Q. Now, when Homer was talking about taking the old man out that morning, he said that the old man wanted to go, didn't he?

A. I think he did, yes.

Q. Well, you hadn't heard the old man say anything about wanting to go, had you?

A. I never heard him say anything much. I never talked to him very much.

Q. Now, how long was it after Homer and the old gentleman got out and came in before you went out for a ride?

(Testimony of Mrs. Jane Carden.)

A. Well, just a short time after; I don't remember just how long.

Q. Now, you were in and out of the room all that time, weren't you, back and forth where the old gentleman was, until you got ready to go out?

A. Yes.

Q. There wasn't any talk about papers or deeds or anything of that kind there at all?

A. No, no, I didn't hear any.

Q. Now, you told Judge Hanna that the only night that Homer stayed with his father in the room was the Saturday night when he came, that is the night before you got there, didn't you?

A. That is stayed all night with him, yes.

Q. How late did he ever stay any other time?

A. No, I stayed with him every night until he got bad.

Q. What say?

A. Until he got bad and then some of the boys came and stayed up with him.

Q. Yes, until he got entirely delirious? He finally got entirely delirious, so he didn't know anything, didn't he? A. Towards the last. [226]

Q. And after he got so bad that he didn't know anything at all, then the boys came and stayed up with him?

A. That is his friends, some of the boy friends.

Q. Now, the only time that he was up in his chair while you were there was that day when he went out riding, and then he was up about twenty minutes, wasn't he?

(Testimony of Mrs. Jane Carden.)

A. Yes, sir, just put him in his chair.

Q. That is the only time he was up in his chair while you were there? A. Yes.

Q. Now, you never heard Homer or Marvel talk to the old man, either of them, about his property or what he was going to do with it, or about his having made or not made a will, did you, while you were there? A. No, I never.

Q. Now, you told Judge Hanna that while you were there Marvel never slept in the room with the old man, didn't you? A. No, he didn't.

Q. He didn't did he? A. No.

Q. Now, you also told Judge Hanna that if either of the boys, while you were there nursing him, Marvel or Homer, had talked with the old man about his property, or him to them, or about his making a will or deeds, you were certain you would have known? You told him that, didn't you?

A. I did.

Q. That is true, is it? A. Yes.

Q. You told him also you were certain they did not? A. Yes.

Q. Now, when they got back in the afternoon, who put the old man in bed? You did, didn't you?

A. Well, I don't remember. I might have helped put him in bed.

Q. Well, didn't you tell Judge Hanna that Homer Watts and Jonas went away from the house and that you put the old man to bed?

A. I couldn't have put him to bed alone.

Q. What say?

(Testimony of Mrs. Jane Carden.)

A. I couldn't have put him to bed alone. [227]

Q. You couldn't?

A. I couldn't have got him from the dining-room to the bed-room alone.

Q. He was so bad off you couldn't have put him in bed alone? A. No, he couldn't walk.

Q. Well, I say he was so bad off you couldn't have put him to bed alone? A. No.

Q. I believe you said just a little while ago that when you came home from your ride there was nobody there but Homer and his father?

A. I believe I did.

Q. That is true is it? A. Yes."

Testimony of Mrs. J. E. Barrett, for Defendant.

Mrs. J. E. BARRETT, sixty years old, a resident of Athena for about twenty-six years, wife of Senator Charles A. Barrett, testified that she had known Thomas J. Watts since she was about thirteen years old; that after he was separated from his second wife he came by the home of witness "as a neighbor would" and told her he had made his will and had given his property to Homer and Marvel, share and share alike, and told her that his first wife died leaving a little girl who had inherited what one of his brothers had left. (Page 556.)

Upon cross-examination she testified that she does not remember the time she had this conversation with Mr. Watts but thinks it was after he was divorced from his second wife.

Testimony of Linden S. Vincent, for Defendant.

LINDEN S. VINCENT, son of Dr. Frederick Vincent, twenty-seven years old, resident of Athena, jeweler by occupation, testified that he was acquainted with Thomas [228] J. Watts the latter part of his life; had his jewelry-store in a part of Hawks' drug-store and that he would see Mr. Watts in the drug-store, would listen to his stories and got pretty well acquainted, and that Mr. Watts seemed to know him very well; that he saw him for the last time six or eight days before his death in an automobile in front of the drug-store in Athena—the store where he had his jewelry-shop—and that he went out to the automobile and had a conversation with Mr. Watts, and was surprised to see him there after knowing that he had been so sick, talked to him and told him he looked "pretty good after being so near dead," "as I had heard—just jollying him up" (page 560), and that Mr. Watts told him he had been pretty sick but was feeling better that day and further said, "I got outside and I feel brighter"; that he talked to him several minutes the way a man will talk to a man when he is sick, and that Henry Dell, as he thinks, came out of the store and talked with Watts; and that Byron Hawks, the druggist came out to the automobile and took an order from Watts; that Byron leaned over to talk to Mr. Watts as Watts did not hear very well; that he himself went into the drug-store and brought out a package to Mr. Watts which Hawks had fixed for Watts, but handed it to Homer as he had gotten into

(Testimony of Linden S. Vincent.)

the car; that the condition of his mind appeared to be "very bright for a man of his condition. I would consider it very bright." (Page 562.) That his conversation was just about the same as usual and that he did not observe any difference in his mental condition. "He seemed just about the same as ever to me, because I stood there quite a little bit."

Upon cross-examination he testified that he had lived [**229**] in Athena about four years; "I went to Athena the latter part of August, 1912. I don't know whether deceased was in Athena during the latter part of 1912. When I saw him in front of the drug-store in the automobile I thought he was looking pretty bright for a man that was so near dead." That he knew Mr. Watts not over a year and eight months, didn't know him only just in the store to talk with him and listen to some of his old tales. (Page 563.) Would see him as he would come into the drug-store, and said, "Uncle Tommy Watts joked with me quite a good deal" (page 564); that he heard Mr. Watts tell Hawks the druggist what he wanted, and Hawks "joshed him" and that Mr. Watts called Hawks "Black Hawk."

"Q. Are you in the habit of joshing dying people?

A. Well, I suppose I would josh most anybody. They josh me up there a great deal.

Q. You realized at that time that he was a man who was about to die didn't you?

A. Well, yes, I did. He was an old man but he was quite spry when I saw him down town; he didn't look so near dead as I expected to see him. I sup-

(Testimony of Linden S. Vincent.)

pose maybe I said that before I thought; but I remember saying something about dying. I remember that all right."

Testimony of Mrs. Homer I. Watts, in Her Own Behalf.

Mrs. HOMER I. WATTS, testified that she moved to Athena in 1907; became acquainted with Thomas J. Watts in 1904 and that he lived with her and her husband a part of the time after they were married, beginning in the spring of 1908, as she remembers it at a time when he had slipped on an icy walk and injured his hip, and later on had [230] slipped and hurt his shoulder; that he lived with her and her husband possibly three and one-half months at that time and also stayed with them about a month in the fall of the year 1912 and a while in the spring of the year 1913. That she remembers the occasion of Mr. Watts being brought to her home in April, 1914, from Washington and of Dr. McIntyre being there; on the next day, Sunday, his divorced wife was there the greater part of the day and also David Taylor was there and that Thomas J. Watts and his divorced wife talked with each other and seemed to be very friendly; that Mr. Watts was asleep when Dr. McIntyre was there that Sunday morning and did not talk to him; she remembers about Mr. Watts being out automobile riding and that George Winship helped Homer get him out of the car and bring him in the house and sat him on a chair and that Mrs. Carden fixed lunch for him and he ate his lunch in

(Testimony of Mrs. Homer I. Watts.)

the living-room on a chair while Homer ate at the table; that he always complained of rheumatism in his hands; that when Homer went away he told Mrs. Carden he would be back in a short time but that he was gone longer than he said he would be and when he returned home he told witness to take the car and take Mrs. Carden up to her house which she did and then went out west of town and around back to Athena (page 572.) That Guy Jonas came with him to the house and was there when she took Mrs. Carden and her little girl home and that when she returned Mr. Watts was sitting in a chair in the living-room and that Homer and Guy Jonas were also there with him; that on the day Mr. Watts was out automobile riding " he seemed the same as he always had to me," and that she did not notice any change in his mental condition until, Friday or Saturday when he began to get "rather droopy" and, on [231] Saturday he didn't seem to realize what was going on and died on Monday; that in the conversation between Mr. Watts and his divorced wife she remembers him asking her if she was sure she had plenty to take care of her and that she heard her tell him she had and that if she didn't have the boys would take care of her;

"Q. Now, prior to Tuesday, the day when the deeds were written, had you heard of Mr. Watts deeding any property, or any deeds to be written?

A. He hadn't talked to me about it, no.

Q. Well, had you heard any conversation between

(Testimony of Mrs. Homer I. Watts.)

him and anyone else regarding deeds or the execution of papers?

A. I think not; I had heard the deeds were to be written but I think my husband had told me that Grandpa Watts had asked him to write some deeds for him. I was told afterwards that some deeds were executed, but I think I never heard Thomas J. Watts mention them." (Page 573–4.) That she never had any difficulty making Mr. Watts understand when she talked with him and that he always talked back to her intelligently; that she never did at any time hear Homer I. Watts or Marvel Watts or Jennie Anderson Watts or any other person make any suggestions to him as to how he should convey his property and that if any one of them used any influence she knew nothing about it.

On cross-examination she testified that when she took Mrs. Carden out for a ride she left Mr. Watts, Mr. Jonas and her husband at the house and no one else and that they were all three there upon her return; that she wrote the John La Roque will which purported to give the bulk of his estate to Homer I. Watts but that her husband did not get the property. [232]

Testimony of Vernita Watts, for Defendants.

VERNITA WATTS testified that she was sixteen years old, daughter of Marvel Watts and Jennie Anderson Watts, and that her grandfather, Thomas J. Watts, lived at their home for about six years, and that when he would be away from home he wrote

(Testimony of Homer I. Watts.)

letters to her and that she wrote letters to him; that she never did try in any way to influence him to deed any of his property to her.

Testimony of Homer I. Watts, in His Own Behalf (Recalled).

HOMER I. WATTS, recalled, identified copy of letter which he had written to Jerusha Crabb April 28, 1914, marked for identification Defendants' Exhibit "P." (Page 580.)

Testimony of John Crabb, for Defendants (Recalled).

JOHN CRABB, recalled by the defendants, testified that he was the owner of about 400 acres of land in Whitman County, State of Washington, which is "good average farming property for that county and state," located about seven miles from a railroad; that he owns an automobile, has his land rented, has five children and is the husband of Jerusha Crabb; that Jerusha Crabb got $10,000 from her uncle's estate, less some expense, but got in the neighborhood of $9,000 net to her.

On cross-examination, he testified that his land about the time of the death of Thomas J. Watts would be worth about $32,000, and that he and his wife were worth about that amount of money at the time of said death.

On redirect examination he testified that he would not sell his land for $32,000, would not sell it for $45,000 cash but believes he would take $50,000 cash for it. [233]

Testimony of B. L. Burroughs, for Defendants.

B. L. BURROUGHS, Recorder of Conveyances for Umatilla County since January, 1911, testified that he had seen the warranty deeds—Defendants' Exhibit "B" and Defendants' Exhibit "C"—and had filed them in his office; that after they were recorded they were returned to the First National Bank of Athena and that he thinks he received them for record from the First National Bank of Athena; that when the cashier of that bank sends instruments for record he puts a blank check in with them to be filled out and that to the best of his knowledge the deeds were sent to him in that manner, but that he has no recollection about it; that he always files instruments as soon as he can after they come, but sometimes there is a "whole bunch of them comes in" and that he takes them one right after another and files them; that if those deeds had been received by him on Sunday he would not have filed them for record until Monday.

"Q. What time did you open your office, Mr. Burroughs?

A. I opened it at eight o'clock for regular business.

Q. You expected to be down at that time?

A. I always am; always here a whole lot earlier than that.

Q. And you stop at the postoffice as you come down?

A. As I come down, yes. And then sometimes somebody goes back and gets the mail, because I come

(Testimony of B. L. Burroughs.)

down too early. You see I am down here a little after six—half past six in the morning. I come down and do my comparing before it is time to open.

Q. But you stop and get whatever mail there is as you come down? A. No, I used to. I don't now.

Q. Well, at that time, I mean?

A. At that time yes, when the postoffice was down here, yes. [234]

Q. You would stop as you came down and get whatever mail there was?

A. Yes, I usually would.

Q. You had a box there?

A. I had a box there, yes. Of course, not always, I wouldn't stop, because sometimes I had a ride down. I couldn't tell you now. If I had a ride, then of course I didn't stop.

Q. But generally I mean?

A. Usually I would stop and get it, yes.

Q. Now, at this time you don't remember anything about these circumstances that occurred at that particular time? A. No, I do not, Judge.

Q. Now, when you would get a whole bunch of them together, why you would mark them right along, each one, one minute after another?

A. Yes; sometimes not one minute, but sometimes I would look over them a little and take more than a minute; sometimes take five minutes, you know, or a minute or two—whatever it was.

Q. But ordinarily when they came right in a bunch together like you had taken them out of the mail?

(Testimony of B. L. Burroughs.)

A. Oh, yes, sometimes I would be looking them over to see whether the revenue stamps were on, you know.

Q. It didn't take you but a minute to do that, did it?

A. Oh, I don't know. I cannot tell about that always. There might be something to attract my attention. I might be called to the phone, or something.

Q. Well, unless there was something equivocal about it to make you take an extraordinary amount of time? A. I would file them a minute apart.

Q. File them on the same date, one a minute after the other? A. Yes, yes.

Q. Now, are the entries in this book that you speak of at this place in your handwriting? **[235]**

A. Yes, that is my handwriting.

Q. Your handwriting or your clerk?

A. Mine—my individual handwriting. My writing, yes, sir.

Q. Now, what was the purpose of making this little memorandum at the bottom on the back of these deeds? Was that for the purpose of making your entries by at a later time?

A. No, that is for the purpose of mailing them out. Then I don't have to look back here after they are recorded. Let me show you now. For instance like this. Here I have got lots of mail. Of course I have got that on the fee-book, Judge, but instead of going back to refer I can take it right off here. I

(Testimony of B. L. Burroughs.)

can mail them right out without referring to the book.

Q. Now, this book that you have got in this particular case, don't show whom they were received from, but it shows to whom they are to be returned, don't it?

A. Well, yes, received from so and so and returned to so and so.

Q. What say?

A. Received from so and so. To whom delivered, it said—to whom delivered, but then I received them generally from these people, usually from these, and then returned to the same ones, you know. Yes.

Q. Deeds are not always returned to the same ones?

A. No, no, no. No, that is not always true but it is usually so.

Q. Now, you would put down there whom they were to be returned to, wouldn't you?

A. Yes, sir.

Q. It might be the same person who delivered them or it might not? A. That is true.

Q. Now, if anyone had come in and brought these deeds and told you to return them to the First National Bank, you [236] would have put down the same entries, wouldn't you?

A. Yes, I would, yes.

Q. Just the same entries, exactly?

A. Yes, I would.

Q. And how far is it from here to Athena?

(Testimony of B. L. Burroughs.)

A. Oh, I think about eighteen miles I should say, yes.

Q. About an hour's automobile ride?

A. Why yes, less I guess, the way they go spinning along.

Q. Now the mail at that time came in from Athena twice each day, once about eight or nine o'clock in the morning and once about five o'clock in the evening, did it not? A. I believe so, yes.

Q. Now, Mr. Burroughs, I wish you would examine this book and see how many deeds were filed for record on the 20th before these two?

A. How many instruments?

Q. Yes.

A. Let's see—1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15—twenty instruments were filed prior to those two.

Q. Twenty instruments? A. Yes.

Q. Now, the first sixteen of those run right along one minute after the other? A. Yes, sir, yes.

Q. Do they not? A. Yes, sir.

Q. That is the first commenced at eight o'clock?

A. The first commenced at eight o'clock.

Q. Then the next at 8:01? A. Yes.

Q. And the next at 8:02? A. 8:02.

Q. The next at 8:03?

A. The next at 8:03, 4, 5, 6, 7.

Q. And so on? A. Up to 15.

Q. Down to 15? A. That is right.

Q. Now the 15th one was filed at 8:15, wasn't it?

A. Yes.

(Testimony of B. L. Burroughs.)

Q. Then the next one was filed at 8:20, wasn't it?

A. That is right.

Q. Now the next one was filed at 9:45 wasn't it?

[237] A. 9:45, that is right.

Q. And the next one was filed at 9:50?

A. 9:50.

Q. And then the next one was filed at 10:05, wasn't it? A. 10:05, yes.

Q. And the next are these two which were filed at 11:20 and 11:25? A. That is right.

Testimony of Jennie Anderson Watts, in Her Own Behalf (Recalled).

JENNIE ANDERSON WATTS, being recalled, testified that there never was at any time prior to the execution of the deeds any understanding expressed or implied in any manner that the deeds were to be procured in order that any interest or title in the property might pass to either Homer or Marvel Watts and that there is no agreement with her regarding the matter and that she never heard of any such contention until this suit was brought and that there is no understanding whereby she would work with any other person in order to secure title to the lands.

Testimony of George Winship, for Defendants.

GEORGE WINSHIP, twenty-two years old, resident of Athena all of his life, employed in the First National Bank of Athena, testified that he knew Thomas J. Watts ever since he was large enough to

(Testimony of George Winship.)

remember and saw him the last time two or three days before he died at the home of Homer I. Watts; that he lives two blocks from Homer Watts and about three and one-half blocks from Marvel Watts; that he remembers the occasion of Thomas J. Watts going out automobile riding a few days prior to his death; that as he was going home for his dinner, he saw Mr. Watts sitting in Homer's car in front of the drug-store or Dell Brothers and that he stopped and asked Mr. Watts what he was doing out in the automobile and that Mr. Watts told him he was taking a ride; that he **[238]** asked him if he was going home to lunch and that Mr. Watts said to him, "No, I think we will go out to the Reservation" (page 613); that he himself was waiting to see Homer at the time and when he found out they were going out to the reservation he did not wait to see Homer but went on to the house as he had been in the habit of taking his meals at Homer's while he was working in the depot; that a while after eating dinner at Homer's house Homer and Mr. Watts came but did not get out of the automobile as Homer said, "Pap wants to go on out to the other ranch" (page 614), so they went away and when they came back Homer asked him to help take Mr. Watts in the house and that he did so, Homer holding one arm of Mr. Watts and he the other, and that when they brought him into the house they sat him down on a chair and that he himself then went to work but saw Mr. Watts every day thereafter until the last two days before he died and may have seen him thereafter in bed

(Testimony of George Winship.)

but did not speak to him as he got so he would not say anything (page 616); that on the day Mr. Watts was out automobile riding, "he just talked to me just the same as he ever did since I have known him"; that he is not related to either Homer Watts or Marvel Watts by blood or marriage.

On cross-examination he testified that he ate a meal at Homer's most every day; that he never paid for his meals there but went and ate whenever he saw fit (page 617); that he is a bookkeeper in the First National Bank and was formerly working in the O. W. R. & N. Co's office at Athena; that what he wanted to see Homer about was whether he wanted anything sent up to the house (page 618); that he knew Homer Watts had a farm on the Reservation but don't know whether old Mr. Watts had one there or not (page 619), and that when he spoke to Mr. **[239]** Watts, he (Watts) was headed toward the reservation; that was in an altogether different direction from the F. J. Watts home ranch. That when Homer and his father came by the house Mrs. Watts asked them if they were not going to come in and eat but that the automobile "just stopped and started," and that Homer said they were going out to the other ranch or something to that effect.

Q. Taken your meals there since? A. Yes, sir.

Q. Is that frequent or otherwise?

A. Whenever I went up there and felt like it, I would stop in and eat if it was anywhere near meal-time.

(Testimony of George Winship.)

Q. Very intimate with the Watts family?

A. I know them quite well.

Q. Any relation to any of the women of the family? A. No, sir.

Q. Are you a married man? A. No, sir.

On redirect examination he testified that he had gone to school to both Homer Watts and Marvel Watts and that he had known them both about as long as he had known anybody.

The entire record in the administration of the estate of Thomas J. Watts, deceased, in the County Court of the State of Oregon, for Umatilla County, was offered in evidence, marked Defendants' Exhibit "Q" and is included in the transcript, commencing on page 680 and ending on page 751. (See page 624.)

Defendants rest. **[240]**

PLAINTIFFS' REBUTTAL.

Testimony of Jerusha Crabb, for Plaintiffs (In Rebuttal).

JERUSHA CRABB, recalled by plaintiffs, testified that she didn't tell Homer Watts or any other person that it was too bad Marvel didn't let her father stay at her house and die and be out of his misery or anything of the kind; never did say anything of that kind, and that she didn't say that if Marvel had not gotten the Colfax doctor her father would have died; that she never did hear her husband say that it seemed like all the relatives were dumping their relatives on him to die or any words to that effect; that her husband always liked to have

(Testimony of Jerusha Crabb.)
her father at their home, was just good and kind to him as he could be; that her father knew she had gotten less than $10,000 out of her uncle's estate; that her father went to Skelton's twice a year at least, during the last five or six years of his life (page 627), and would stay from a month to six weeks at the time and always seemed to think lots of Skelton and spoke very highly of him, never complained to her about him, but that she never saw Skelton until the time of the trial of this case.

"Q. Now, at the time when your father was living up there did you know or had you ever heard anything about these scandals that had been developed about your father in this case?

A. No, sir, I never heard anything until I come here.

Q. When and from whom did you first hear that there was any scandal about your father up there?

A. Which, about Mr. Skelton, you mean?

Q. No, any scandal—when and from whom did you first hear that there was a scandal about a woman up there—with your father—about your father—who told you about it first?

A. Why, Marvel did—when I was down in Athena, spoke about [241] it, but I don't know who it was—didn't know it was anything about Mrs. Skelton. That was at the time her father died, but that she didn't know Mr. Skelton had anything to do with it at the time." (Page 627–8.)

That she did not tell Marvel Watts the will was destroyed on the 3d of April; that the will was de-

(Testimony of Jerusha Crabb.)

stroyed either Monday, Tuesday morning, or Wednesday morning before Marvel came and that he was there on Friday.

"Q. What, if any, education did you have?

Mr. RALEY.—Objected to upon the ground it has all been gone over on direct examination, and is not in rebuttal of anything offered by the defendants.

A. I went to the little country schoolhouse.

Q. Anything else? A. Nothing.

Q. I am not sure whether I asked you this or not but I will ask you now to make sure; did you ever get any assistance in the matter of your education from your father's estate? A. None whatever.

Q. Now, you have heard the testimony of Mrs. Marvel Watts and Vernita as to she and Vernita being good to your father when he was at their house? A. Yes, sir.

Q. How were your children towards him when he was at your house?

A. They were good to him.

Q. How did they feel towards him and him towards them?

A. They thought lots of him and he seemed to think an awful lot of them.

Q. Now, there was some testimony about lacing shoes. Who laced his shoes for him at different times in the last years, when at your house?

A. I or my daughter, one or the other; either one of us—whichever one was around—waited on him. **[242]**

Q. Now, did you make any hardship of that or

were you glad to do it?

A. We was glad to. He was always easy pleased and pleasant.

Q. During the last six years, how many times have you nursed him through sickness?

A. Never through sickness but once till this last sickness.

Q. Well, that makes twice then altogether?

A. Yes.

Q. When was the first time?

A. Why it was three years before he died; the winter three years before he died.

Q. How long was he sick at your house that winter?

A. He came to my place the fore part of December and stayed till some time the latter part of February.

Q. And what part of that time was he sick there?

A. Well, it seems as if he caught cold, a severe cold, coming down from Spokane, and it settled in his head. He had a gathering in his head. He was able to sit up all the time but he was very *deal* and very poorly.

Q. Well, now who took care of him and nursed him through that sickness?

A. I did and my daughter; she was there.

Q. That is the daughter who is now Mrs. Wheeler?

A. Yes.

Q. She was not married then?

A. No, she was going to school. We was living in St. John at the time.

(Testimony of Jerusha Crabb.)

Q. Now, then, this last sickness, did your daughter help you take care of him?

A. Yes, sir, when I wasn't there, why, she took care of him.

Q. Now, during that last sickness when he was at your house, was your toilet in the house or out of the house? A. Out of the house.

Q. Was he able to go to the toilet during all of that time [243] that he was up there?

A. No, sir, he never went out of doors after the first morning he was there.

Q. He went out the first morning, did he?

A. Yes, sir.

Q. After that—

A. He never was out of doors till they carried him out.

Q. After that you attended to him in the house, did you? A. Yes, sir.

Q. Did your daughter help you about that?

A. Yes, sir, lots of times.

Q. Did you think that was any hardship?

A. No, sir.

Q. You were glad to do that? A. Yes, sir.

Q. At this time when he was sick three years before he died, did your husband help you to take care of him? A. Yes, sir.

Q. How was he—was he glum or was he cheerful about it? A. He was always cheerful.

Q. Did he seem to think that it was any burden at any time to help take care of your father?

A. No, sir.

(Testimony of Jerusha Crabb.)

Q. He was always cheerful? A. My husband?"

"That Homer Watts in the presence of her husband and Judge Hanna in his office when they were trying to investigate this matter in June after her father's death, said 'That his brother Marvel didn't know anything about these deeds until after his father's death.' "

On cross-examination she said that Homer told her he wrote the deeds; that she never heard anything about the trouble between her father and the Skeltons until after her father's death; that she never was adopted by her uncle.

Testimony of John Crabb, for Plaintiffs (In Rebuttal).

JOHN CRABB, recalled by plaintiffs, testified that he was at the funeral of Mr. Watts; that he did not hear his [244] wife say anything to Marvel about being sorry that Marvel didn't leave her father at her house so that he would have died and been out of his misery, but did hear her say he would have died if Dr. Mitchell had not been there to help Dr. McIntyre; that he did not say to Marvel Watts that it seemed like all the relatives were being dumped upon witness or anything of the kind; that Mr. Watts was very nice and very easy to take care of in the condition he was, always had a nice word to say, was pleasant and agreeable and was "not a grouchy man at all."

"Q. How did you feel about having him there?

A. My wife had helped me to take care of my

(Testimony of John Crabb.)

father for fourteen years and I felt grateful that I could help take care of him." (Page 639.)

That Mr. Watts seemed to like the Skeltons and to enjoy their company and said that "they treated him well and took care of him good"; that he never heard anything about the scandal between Mr. Watts and Skelton's wife until after the death of Mr. Watts; that he and Judge Hanna were at the home of Mrs. Carden and had a conversation with her; that Judge Hanna is one of the leading lawyers in Spokane (page 642); and that Mrs. Carden told him that if Marvel or Homer had talked with Mr. Watts about this property or about making a will or deeds she would have known it and that she was certain they did not talk to him about it. Also she said that Guy Jonas was the man who helped take the old gentleman out of the automobile when they came back from the ride. She also said that Mrs. Homer Watts asked her to take a ride with her; that she afterwards repeated all these same things to Mr. Bennett (pages 641–2). That he did not hear his wife and Marvel's wife talk about the will at **[245]** his house about the 3d of April; that the will had been destroyed three or four days before Marvel came up there on the 3d of April; that they were first informed about the deeds when they got notice that the administrator was appointed (page 644); that Mr. Watts was sick at his home through the months of December, January and a part of February about three years before he died; that he and his family took care of him and nursed him through

(Testimony of John Crabb.)

that sickness, and laced his shoes and paid him such little attentions; that they thought it no burden and were glad to do it and glad to accommodate him and favor him in any way they could (page 644); that he heard Homer Watts say in the presence of Judge Hanna and Jerusha that Marvel didn't know anything about the deeds until after his father's death.

Upon cross-examination he testified that he and Jerusha and Judge Hanna were at Homer's office about an hour and a half in the month of June after the death of Mr. Watts and at the time he made this statement:

"Now are you sure that Homer said that Marvel didn't know anything about the deeds being made out until after his father's death or until after they were made?

A. He said until after he was dead.

Q. You remember that distinctly?

A. Yes, sir." (Page 646.)

That Homer told them about how the deeds were made; that Mr. Watts did not learn before the year 1910 that Jerusha would not get over about $9,000 from her uncle's estate; that Mr. Watts told him once eight or nine years before his death that he had made a will and burned it up or destroyed it but did not tell him about making the last one—never told him that he ever left Jerusha anything; never told him anything about burning up or destroying the last will— "He never told **[246]** me anything about it." Witness then said, "He did too, the morning after he had burned it up, he said

(Testimony of John Crabb.)

he had burned it up; just as quick as I came in after he burned it—it was not more than half an hour he told me he had burned it up" (page 651); that at another time Mr. Watts said to him, "Now, John, I have burned up the will" (page 652); that he does not remember having had any talk with Marvel about the will. That he went with Judge Bennett to Athena to gather evidence, went to see Mrs. Carden but did not tell Judge Bennett that he and Judge Hanna had talked with her (page 656); that he remembers Mrs. Carden told him and Judge Hanna that Guy Jonas helped to take Mr. Watts out of the car after they had taken a ride and that she told them Guy Jonas helped put him in the car; that Mrs. Carden told him and Judge Hanna she had taken care of Mr. Watts but that she and Mr. Watts didn't talk much together, that she went there to wait on him Sunday morning and that when people came in she would step outside and didn't stay to hear conversations between them and Watts (page 660); that Mrs. Carden told him and Judge Hanna that Mrs. Watts had asked her to take a ride in the car that day as she was ready to go home —said something about going home. "She said she wanted to go home and that when Mrs. Watts asked her if she would take a ride with her in the car she said yes, but she wanted to go home" (page 661); that Mrs. Carden told Judge Bennett that Guy Jonas and Homer Watts helped put Mr. Watts in the car when they started to ride, and also told them that Homer and Mr. Watts and Guy Jonas were there

(Testimony of John Crabb.)

at the time they came back from the ride (page 665) told them that Guy Jonas came just about the time the car came and helped take Mr. Watts out and put him in the house (page 665); that Mrs. Carden told them that [247] Guy Jonas came to Homer's afoot.

Testimony of James A. Fee, for Defendants.

JAMES A. FEE testified that he had been a practicing attorney at Pendleton since 1884 and that he was at one time Circuit Judge for seven and one half years; introduced himself to Marvel Watts the latter part of July, 1914, at his office at the mill, had a talk with him and that Marvel told him he did not know anything about the deeds in question until after his father's death. That he is positive that Marvel made that statement (page 669).

On cross-examination he testified that after he walked out of the mill and reached a picket fence quite a distance from the mill he stopped and made a memorandum of his conversation with Marvel Watts but had been unable to find the memorandum but did find a reference to it that convinces him the conversation occurred; that he was there for the purpose of interviewing Mr. Watts regarding an adjustment of the matter before it reached a stage of litigation as he had prior to that time talked with Judge Hanna and possibly with Mr. Crabb.

Being further examined by Mr. Homer Watts, one of the defendants, witness testified (page 670) that there was not a great deal of conversation between

(Testimony of James A. Fee.)

himself and Marvel Watts; that Marvel Watts and Homer Watts may have been at his office thereafter but that he is not positive; that he don't think that he made any such statement, that he feels confident he did not (page 671); that he was convinced there was nothing in Mrs. Crabbs' contention—but thinks he did talk to Marvel and Homer in his office—thinks they came regarding some little matter that had occurred in the accounting which was not fully covered (page 672); that he told Marvel and Homer about his own father having a little money **[248]** and one of the children getting him away and taking the money away from him and putting him back on witness to die (page 672); but that he did not tell them he believed Jerusha had tried to get Mr. Watts up to her home to get his property away from him or words to that effect, and that he is absolutely positive about it; that he talked with Homer Watts twice about this matter; that he didn't go to see Marvel Watts to get any statement from him at all except to see whether an adjustment could be made or not (page 673); that Marvel Watts told him the deeds were made by his father in pursuance to a plan he had in mind for years prior to that and that he (Marvel) had no compromise to make with Mrs. Crabb, and that Marvel further told him that when he (witness) saw Mrs. Crabb she would do all of the talking and that he would have no chance to do any part of it, and further told him that she had been to Athena, gone to his home when he was away, inquired where he was and would not believe his

(Testimony of James A. Fee.)

family's statement he was away from Athena. That the County Court proceedings were dismissed at the suggestion of himself and Judge Hanna and that he was satisfied that the accounting was fair and was made fully and in good faith. That he remembers Homer Watts being in his office after the present suit was brought and that he told Homer Judge Bennett was the man who was bringing the case, or words to that effect, but that he did not tell Homer Watts there was "nothing in the case," but "I may have said to Mr. Homer Watts at some time that the case was a doubtful case, or something of that character, because I regarded it so" (page 678); that he did not tell Homer he told Judge **[249]** Bennett he had gone into the case thoroughly and had convinced himself there was nothing in it, but did tell him that his name would not have been upon the pleadings except for the fact that Judge Bennett had been to his office and said, "Well, I will think about whether to file the case or not, but if I do I may join your name with me on the pleadings." (Page 678.)

In the record in the County Court of the State of Oregon for Umatilla County, in the matter of the estate of T. J. Watts, deceased, it is alleged (in the petition for the appointment of administrator) that T. J. Watts died intestate on the 20th day of April, 1914, in said county and state, was the owner of real property of the probable value of $5,000. That M. L. Watts was appointed administrator of the estate on the 24th day of April, 1914, filed an under-

(Testimony of James A. Fee.)

taking in the sum of $6,000 on the 24th day of April, 1914, which was approved by the County Judge; that letters of administration were issued on the 24th day of April, 1914; that the inventory and appraisement was filed on the 29th day of April, 1914, appraising the real property belonging to the estate at $4,100; that notice to creditors was published in the "Athena Press" newspaper for four consecutive weeks, commencing on the first day of May, 1914. That Jerusha Crabb filed a petition on the 30th day of October, 1914, alleging among other things that after the death of T. J. Watts, M. L. Watts and Homer I. Watts wickedly and corruptly conspired and confederated together for the purpose of cheating, wronging and defrauding the said Jerusha **[250]** Crabb out of her "just share and portion of the estate of said deceased," and as a part of the conspiracy caused to be filed a petition for the appointment of an administrator and obtaining the appointment of M. L. Watts as administrator; that for more than ten years prior to the death of T. J. Watts he was the owner of about five hundred acres of tillable lands capable of producing large and valuable crops and that M. L. Watts and Homer I. Watts had the lands leased for about ten years and had raised large and valuable crops thereon, and that the deceased during the last five or six years of his life had loaned and placed in their keeping large sums of money amounting to many thousands of dollars and that after the appointment of M. L. Watts as administrator they "falsely and fraudulently and with intent

(Testimony of James A. Fee.)

and purpose of cheating, wronging and defrauding Jerusha Crabb caused the estate of the said T. J. Watts to be appraised and listed only eighty acres of land as belonging to the estate (describing it); and further alleged that they had never accounted to or with the deceased for the rents, issues and profits of the lands farmed by them and that they had not paid moneys loaned them by him or which had been placed in their keeping; that at the date of his death the rents, issues and profits of the land and the moneys loaned to and placed in their charge constituted a part of the estate, and that the time of making the inventory and appraisement of the estate they well knew the rents, issues and profits of the lands had never been accounted for nor paid over to the deceased in his lifetime, and that the said rents and money constituted a part of the estate and that a just and equitable accounting would show there [251] were due the estate large sums of money aggregating more than $12,000, "the exact amount being unknown to your petitioner," and that if they were permitted to continue acting as administrator and as attorney for the estate they would waste the property thereof in useless and expensive litigation and sequester the property and convert it to their own use and that they "will wickedly, wrongfully and corruptly deprive this petitioner of her just share therein and portion thereof" (page 694). The prayer of petition asks that they be required to account to the court for the rents, issues and profits of the real property and for the moneys

(Testimony of James A. Fee.)

loaned to or left in their keeping and be required to pay the same over and that Homer Watts be removed as attorney of the estate and that M. L. Watts be removed as administrator and that "some honest and competent person be appointed as administrator thereof to recover the property of the said estate and dispose of the property thereof under the direction of the court." (Page 695.) The petition was signed by James A. Fee and Hanna and Hanna, Attorneys for the petitioner and sworn to by Jerusha Crabb on the 27th day of October, 1914. Thereafter, on the 1st day of December, 1914, M. L. Watts and Homer I. Watts filed their answer admitting the death of T. J. Watts, appointment of administrator, appraisal of the property, but denying all of the remainder of the material allegations of the petition and further alleging that they had farmed the lands of their father for ten years in a husbandly manner in full compliance with agreement made with him and that they had a full and complete settlement and accounting with the said father each and every year. Therafter on the 26th day of January, 1915, Jerusha Crabb filed her reply in which she **[252]** denies nearly all of the material allegations of the further and separate answer of the said Homer I. Watts and Marvel Watts.

On the 9th day of March, 1915, she filed a motion with the county court asking for an order requiring M. L. Watts, as administrator, and Homer I. Watts as his attorney, to produce in court on March 10, 1915, all books, papers, vouchers, receipts, accounts,

(Testimony of James A. Fee.)

letters and other things in their possession or under their control pertaining to the estate and especially all books of accounts, showing the condition of accounts between them and the said decedent, in order that said documents might be open to the inspection of the said Jerusha Crabb and her attorneys. On the 9th day of March, 1915, pursuant to said motion, the County Judge made the order prayed for. Thereafter on the said 10th day of March 1915, the petition came on for hearing in open court, the petitioner appearing in person and by E. K. Hanna and James A. Fee of her counsel, and the administrator and his attorney in person and by Will M. Peterson of their counsel. A conference was had. The books, accounts and papers were examined, the matter discussed and considered by all of the parties, and the petitioner was satisfied that she would not be able to sustain any of the material allegations of her petition and represented that her petition might be dismissed.

Whereupon it was ordered, considered and adjudged by the court that her petition be dismissed. Thereafter on the 30th day of March, 1915, a report was filed by the administrator. On the 22d day of June, 1915, a petition for the sale of the eighty acres alleged to belong to [253] the estate and which the testimony in this case shows to have been actually sold to pay the debts of said estate was filed; an order for citation was issued on the same day, citation issued the same day. Order for publication of citation was issued on the second day of July, 1915,

(Testimony of James A. Fee.)

and citation published in the Athena Press at Athena, Umatilla County, Oregon, requiring the heirs of the estate to appear before the court on the 31st day of July, 1915, and show cause if any why an order of the Court should not be made authorizing the said sale of the real property. On the 4th day of August, 1915, default of Jerusha Crabb for want of answer was entered by order of the Court. Thereafter on the same day an order for the sale of the real property was made, notice given, proof filed with the clerk, sale was made on the 4th day of September, 1915, to F. B. LeGrow for $4,100. Return of the proceedings of the sale was filed September 14, 1915. Order confirming sale of the real property was made on the 28th day of October, 1915. Final account and report of the administrator was filed on the 6th day of November, 1915. Order appointing time and place for final settlement was filed the 6th day of November, 1915, appointing the 11th day of December, 1915, at the hour of ten o'clock as the time for the hearing of the final account. On the 13th day of December, 1915, decree upon final account was filed in which the administration of the estate was ordered closed.

WILL M. PETERSON,
RALEY & RALEY,
Attorneys for Defendants.

Order Approving Statement of Evidence.

The foregoing statement of facts is duly approved as the transcript in the cause.

CHAS. E. WOLVERTON,
Judge.

Filed July 20, 1918. G. H. Marsh, Clerk. [254]

And, to wit, on the 7th day of June, 1918, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [255]

In the District Court of the United States for the District of Oregon.

Case No. 7340—IN EQUITY.

JERUSHA CRAB and JOHN CRAB, Husband and Wife,

Plaintiffs,

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS and VERNITA WATTS,

Defendants.

Praecipe for Transcript of Record.

To G. H. Marsh, Clerk of the Above-entitled Court:

There is presented and filed herewith such portions of the evidence as the appellants deem essential for a decision of the questions presented on appeal in the above-entitled matter, and you are hereby requested and directed to at once prepare a transcript

of record on appeal in the above-entitled cause, and to incorporate therein that portion of the evidence herewith presented.

You are requested and directed also to incorporate in such transcript of record all the pleadings in said cause, including the complaint, process, return and answer and reply, the opinion of the Court and its decree in said cause, and also the appellate proceedings in your office, containing a petition for appeal, assignments of error, order allowing appeal and bond, citation on appeal and service thereof, and a copy of all deeds of conveyance offered in evidence in said cause.

Dated this 6th day of June, 1918.

JAMES H. RALEY,
WILL M. PETERSON,
Attorneys for Appellant.

Service by copy of praecipe and facts is hereby accepted at Pendleton, Or., this 6th day of June, 1918.

JAMES A. FEE,
One of Attorneys for Plaintiff.

Filed June 7, 1918. G. H. Marsh, Clerk. [256]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 3 to

256, inclusive, contain a true and complete transcript of the record of proceedings had in said court in accordance with the praecipe for transcript filed by the appellants in the case of Jerusha Crab and John Crab, husband and wife, plaintiffs and appellees, against Homer I. Watts, Marvel Watts, Jennie Anderson Watts, and Vernita Watts, defendants and appellants, as the same appear of record and on file at my office and in my custody; and I further certify that the cost of the foregoing transcript is $74.40 and that the same has been paid by the said appellants.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 26th day of August, 1918.

[Seal] G. H. MARSH,

Clerk. **[257]**

[Endorsed]: No. 3207. United States Circuit Court of Appeals for the Ninth Circuit. Homer I. Watts, Marvel Watts, Jennie Anderson Watts, and Vernita Watts, Appellants, vs. Jerusha Crabb and John Crabb, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed August 29, 1918.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the District Court of the United States for the District of Oregon.

No. 7340.

June 27, 1918.

JERUSHA CRABB and JOHN CRABB

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS and VERNITA WATTS.

Order Enlarging Time to August 1, 1918, to File Record and Docket Cause.

Now, at this day, for good cause shown, IT IS ORDERED that the time within which the defendants above-named are required to docket this cause and to file the transcript of record thereof in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to August 1, 1918.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: No. 3207. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Aug. 1, 1918, to File Record Thereof and to Docket Case. Filed Jul. 1, 1918. F. D. Monckton, Clerk.

In the District Court of the United States for the District of Oregon.

No. 7340.

July 26, 1918.

JERUSHA CRAB and JOHN CRAB

vs.

HOMER I. WATTS et al.

Order Enlarging Time to and Including August 15, 1918, to File Record and Docket Cause.

Now, at this time, for good cause shown, it is ORDERED that the time for filing the transcript of record on appeal in this cause and for docketing this cause in the United States Circuit Court of Appeals, for the Ninth Circuit, be and the same is hereby extended to and including August 15, 1918.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: No. 3207. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Aug. 15, 1918, to File Record Thereof and to Docket Case. Filed Aug. 8, 1918. F. D. Monckton, Clerk.

In the District Court of the United States for the District of Oregon.

No. 7340.

August 13, 1918.

JERUSHA CRAB and JOHN CRAB

vs.

HOMER I. WATTS et al.

Order Enlarging Time to and Including August 31, 1918, to File Record and Docket Cause.

Now, at this day, for good cause shown, it is ORDERED that the time for filing the transcript of record on appeal in this cause and for docketing this cause in the United States Circuit Court of Appeals, for the Ninth Circuit, be and the same is hereby extended to and including August 31, 1918.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: No. 3207. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Aug. 31, 1918, to File Record Thereof and to Docket Case. Filed Aug. 19, 1918. F. D. Monckton, Clerk.

No. 3207. United States Circuit Court of Appeals for the Ninth Circuit. Homer I. Watts et al. vs. Jerusha Crabb et al. Order Three Under Rule 16 Enlarging Time to Aug. 31, 1918, to File Record Thereof and to Docket Case. Refiled Aug. 29, 1918. F. D. Monckton, Clerk.

No. 3207

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS AND VERNITA WATTS,

Appellants,

Vs.

JERUSHA CRAB AND JOHN CRAB,

Appellees.

BRIEF OF APPELLANTS

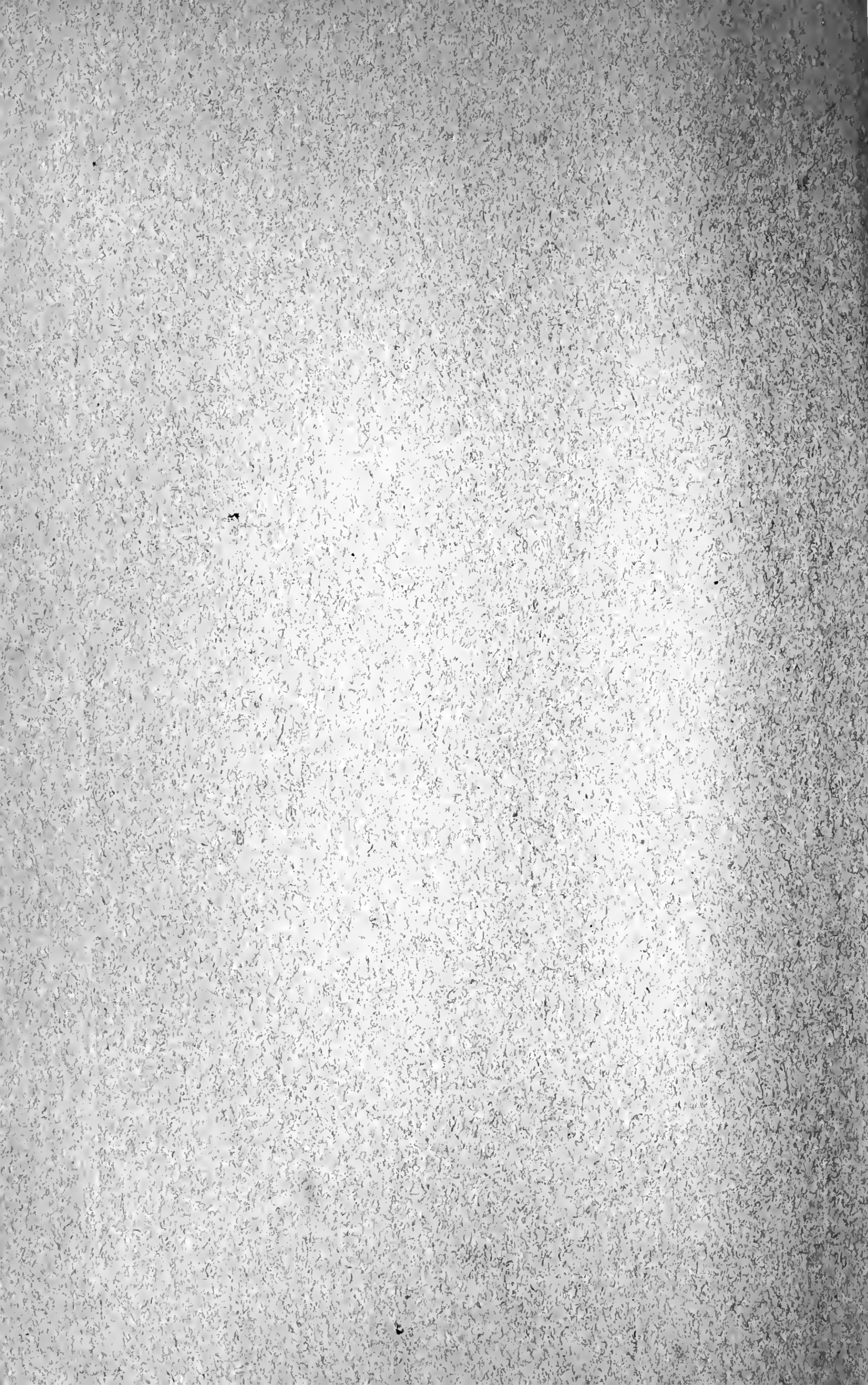
Upon Appeal from the United States District Court for the District of Oregon.

WILL M. PETERSON
JAMES H. RALEY,
Attorneys for Appellants.

ALFRED S. BENNETT,
JAMES A. FEE,
Attorneys for Appellees.

East Oregonian, Pendleton

FILED
JAN 23 1919
F. D. MONCKTON,
CLERK.



UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS AND VERNITA WATTS,

Appellants,

Vs.

JERUSHA CRAB AND JOHN CRAB,

Appellees.

BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Oregon.

STATEMENT OF THE CASE

Thomas J. Watts, the grantor in the deeds hereinafter referred to, died on the 20th day of April, 1914, and at the time of his death was approximately eighty-two years old. He was first married in Albany, in the State of Oregon, and his first wife died in 1865, in the State of Idaho, leaving as the issue of such marriage two children, Jerusha Crab, one of the plaintiffs in this case, who was two years old at the time of the death of her mother, and another sister who subsequently died without heirs, and who is not in any manner interested in this proceeding.

The minor child Jerusha Crab, after the death of her mother, was first taken to live with an uncle, and remained there a year or such a matter, and returned and lived with her father, Thomas J. Watts, and her grand father for about three years, and at the age of six years was again taken to her uncle, Marvel Watts (not the defendant), who promised to make her one of his heirs, and with whom she ever afterward made her home until she married the other plaintiff herein, John Crab, and established a home for herself, never having since the age of six years lived with her father or his family, and having visited her father only a very few times and that in recent years.

After the death of his first wife, the mother of Jerusha Crab, Thomas J. Watts moved to Umatilla County, about the year 1870, and was again married in March, 1871, and since that date up to the time of his death lived continuously in Umatilla County, and either in or near the Town of Athena, Oregon.

There was born to Thomas J. Watts and his second wife while they lived in Umatilla County, two of the defendants in this case, Homer I. Watts and Marvel Watts, who were raised upon the farm and at the home of their father and mother, and during their boyhood days and for some time after their majority remained in and about the farm and assisted in the upbuilding, procuring and establishment of the home and the lands hereinafter referred to.

Marvel Watts, the older of the two boys by the

second wife, is now about forty-three years of age, and Homer Watts, the second of the two boys, is about forty-one years of age. Jerusha Crab, the plaintiff, is a half sister to these two boys, the defendants in the case. Marvel Watts, the older of the two boys, has been married for about eighteen years, and Jennie Anderson Watts, one of the defendants, is the wife of Marvel Watts and the daughter-in-law of Thomas J. Watts. To Marvel Watts and Jennie Anderson Watts there has been born one child, Vernita Watts, a crippled girl, who is now about sixteen years of age and is the granddaughter of the deceased, Thomas J. Watts. Homer I. Watts is married, has no children and his wife is not made a party defendant in this cause, Vernita Watts being the only grand child of the deceased, excepting the children of Jerusha Crab.

Thomas J. Watts and his second wife, Lizzie, the mother of the two boys, Homer I. and Marvel, lived together from 1871 until 1908, when Lizzie Watts secured a divorce from Thomas J. Watts, and though divorced, they continued to be on very friendly relations, the divorced husband frequently visiting Lizzie's home. Lizzie Watts survived her divorced husband and died at Athena, in Umatilla County, Oregon, on March 4, 1915.

For many years there seemed to have been but little or no communication between Thomas J. Watts and the daughter by the first wife, Jerusha Crab. It

was apparently an understanding, and which was later fulfilled, that Jerusha Crab should be one of the heirs of her uncle, Marvel Watts, with whom she made her home, and it appears in evidence that in pursuance of this understanding and agreement, she did inherit approximately $10,000.00 from said uncle, and in the mean time and after her marriage to John Crab, they had accumulated of their own a large amount of other property, approximately fifty or sixty thousand dollars worth, were comfortably fixed and well-to-do, all of which was known by Thomas J. Watts during his life time.

During the latter years of his life Thomas J. Watts occasionally visited with his daughter, Jerusha Crab, at her home in St. Johns, Wash., a distance of some 130 miles from Athena, and frequently traveled around at other places, making different trips to California, but during all of the time subsequent to the divorce from his second wife having and claiming the home of Marvel Watts, his son, at Athena, Oregon, as his home, and returning there always, retaining a room and bed at that place and treating it generally as his home.

During the time that the deceased lived in Umatilla County, he, together with his two boys, defendants in this case, and his second wife, Lizzie, accumulated quite a bit of property consisting of lands and town property. At the time of the divorce between Thomas J. Watts and Lizzie Watts he conveyed to his wife as a settlement of their property

rights certain property in Athena, and a valuable farm of 160 acres, thus settling their property rights and leaving the old gentleman at that time possessed of certain lands which will be described as three separate tracts:

First: The West Half of the Southeast Quarter, and the Southeast Quarter of the Southwest Quarter of Section 32, Township 5 North, Range 35 East, W. M. (Subsequently deeded to Marvel's wife.)

Second: The South Half of Section 30, Township 5 North, Range 35 East, W. M. (Subsequently deeded to the granddaughter, Vernita Watts).

Third: The Southeast Quarter of the Southeast Quarter of Section 31, and the Southwest Quarter of the Southwest Quarter of Section 32, Township 5 North, Range 35 East, W. M. (Remaining in the estate at the death of Thomas J. Watts).

For several years prior to the old gentleman's death the two boys, Homer and Marvel, had been farming the lands described, under a lease, giving to the lessor as rental therefor one-third of the crops raised.

Shortly before his death, and on the 14th day of April, 1914, the deceased deeded to Jennie Anderson Watts, the wife of his son, Marvel Watts, the West Half of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter of Section 32, Township 5 North, Range 35 East, **reserving, how-**

ever, to himself and for his own use during his life time, the rents, income and proceeds from said tract of land; and on the same date he deeded to his granddaughter, the daughter of Marvel Watts and Jennie Anderson Watts, the South Half of Section 30, Township 5 North, Range 35 East, absolute, retaining still in his own possession and his ownership the Southeast Quarter of the Southeast Quarter of Section 31, and the Southwest Quarter of the Southwest Quarter of Section 32, in Township 5 North, Range 35 East, W. M., which was owned by him at the time of his death and was subsequently administered upon as part of his estate.

This suit is brought by the plaintiffs against the defendants seeking to set aside the deeds given to Jennie Anderson Watts and Vernita Watts, on the grounds: **First,** that the grantor was at the time of executing the deeds incapacitated to make the deeds. **Second,** that he was induced to make them through undue influence exerted by the defendants. Plaintiffs also seek an accounting for crops raised on the lands since the death of Thomas J. Watts.

The plaintiffs also alleged that the defendants, Homer I. Watts and Marvel Watts, are the true beneficiaries under the deeds, and **demand** answers under oath from the defendants respecting all the material allegations of the bill of complaint.

The issues primarily involved are: **First,** was Thomas J. Watts at the time of the execution of the

deed of sufficient mental capacity to make an intelligent and knowing disposition of his property by deed; **Second**, was the making of the deeds the free and voluntary act of Thomas J. Watts, uninfluenced by any fraud, menace, persuasion or undue influence by the defendants.

Upon appeal a further issue arises upon the ruling of the District Court in denying defendants' motion to dismiss plaintiffs' bill for want of sufficient proof to sustain the allegations of the bill.

The District Court by findings and decree finds that the deeds were executed by Thomas J. Watts and that the deceased was probably possessed of a disposing mind, though in a weakened physical and mental condition. But further finds that the defendants by imposition and undue influence caused the deeds to be executed by him.

ASSIGNMENTS OF ERROR

I.

The Court erred in refusing to grant the motion of the defendants "For anorder to dismiss the bill of the plaintiffs upon the grounds that they have not offered any evidence sufficient to overcome or even to balance the answers which they have called for in this case under oath, and which have been sworn to, and are responsive in every manner to the allegations of the complaint"; which said motion was interposed by the defendants at the conclusion of the testimony

introduced by the plaintiffs in chief. The record discloses that the defendants were **required to answer** under oath, which they did. Defendants contend that since the plaintiffs sought a discovery, requiring the defendants to answer under oath, they are bound by the old rule that the sworn statements by the defendants in direct response to an allegation in the bill is deemed to be true, unless contradicted by two witnesses, or a single witness and corroborating circumstances. Defendants insist that at the time their motion was interposed there was no evidence whatever in support of the material allegation of the bill and that regardless of the motion, plaintiffs' complaint should have been dismissed for lack of proof.

II.

The Court was in error in finding and decreeing in the decree that Thomas J. Watts was the owner at the time of his death of the following described lands in Umatilla County, State of Oregon: The West Half of the Southeast Quarter, and the Southeast Quarter of the Southwest Quarter, of Section 32, and the South Half of Section 30, in Township 5 North, Range 35 E., W. M.

III.

The Court was in error in finding and decreeing that for a considerable time prior to his death the said Thomas J. Watts was "feeble in mind and mentally weak and easily influenced," and "That Homer

I. Watts and Marvel Watts procured from said said Thomas J. Watts a deed," for the said property.

IV.

The Court was in error in finding and decreeing in the decree that the deeds were without valuable consideration and were secured by fraud and deception and undue influence, and that they were not the voluntary and intelligent act of Thomas J. Watts, and that they are fraudulent and void and of no effect.

V.

The Court was in error in finding and decreeing in said decree that Jerusha Crab is the owner in equity by virtue of inheritance of an undivided one-third interest in said real property.

VI.

The Court was in error in finding and decreeing in said decree that Jennie Anderson Watts and Venita Watts are seeking to take advantage of any action of Marvel Watts and Homer Watts.

VII.

The Court was in error in the decree in decreeing that the deed be set aside and cancelled.

VIII.

And the Court was in error in finding and decreeing that Jerusha Crab is entitled to recover a one-third interest of the amount received from the crops of the said lands for the year 1917.

While the assignments of error embody several grounds of complaint urged by defendants against the decree of the District Court, they are all dependent and rest upon the First and Fourth Assignments, and for the purposes of this brief may be summed up in two general propositions:

First: The refusal of the Court to grant defendants' motion and dismiss plaintiffs' bill for a failure of proof.

Second: Were the deeds secured by fraud, undue influence or deception, and not made as the intelligent and voluntary act of the grantor.

ARGUMENT AND AUTHORITIES ON MOTION TO DISMISS BILL.

Considering now the first of the foregoing propositions, we call attention to Paragraphs 5, 6, 8 and 11 of the plaintiffs' complaint, the material part of which reads as follows:

V.

That for a considerable time prior to the death of said Thomas Watts he was very old and feeble in mind and body, and was sick and mentally weak and easily influenced and incapable of doing business or of an intelligent comprehension of his affairs or of making a conscious or intelligent disposition of his property among those entitled to his bounty.

That shortly before the death of said Thomas

Watts and while he was on his death bed and suffering from his last sickness, and so incapacitated as hereinbefore stated, the said defendants Homer I. Watts and Marvel Watts, Jennie Anderson Watts and Vernita Watts, and especially the defendants Homer I. Watts, Marvel Watts and Jennie Anderson Watts, conspired together to cheat and defraud the plaintiff, Jerusha Crab, out of her interest in her father's estate and to secure a deed purporting to be a deed from said Thomas Watts to the said Jennie Anderson Watts for the following described property, to-wit: * * * * * *

VI.

Plaintiffs further allege that said deeds and each of them were wholly without any valuable or other consideration and that the same, if executed by him at all, were secured from the said Thomas Watts when he was not fully conscious and was mentally incapacitated from making such a conveyance and by fraud and deception and undue influence, and by taking advantage of his enfeebled mental and physical condition, but that the said deeds were secured and obtained when the said Thomas Watts was sick in bed at the home of the defendant Homer I. Watts, and when the only other person present was a witness secured by said defendant, and that these plaintiffs have no knowledge nor means of knowledge as to the exact details as to how said deeds were obtained, or as to whether they were induced and secured by such undue influence and fraud, misrepre-

sentation and conduct as hereinbefore set forth and were actually signed by said Thomas Watts, or whether his name was forged thereto, but plaintiffs allege that said deeds were not the conscious and intelligent act of said Thomas Watts if signed by him at all, and that he had no intention or purpose of disposing of the said property or conveying it as set forth therein, and that in equity and good conscience said deeds are graudulent, void and of no effect.

VIII.

That plaintiffs believe and allege that the said Homer I. Watts and Marvel Watts and the other defendants have some arrangement between themselves by which they are to be the real owners and to receive the benefits from such land, and that the deeds were procured in the form they were solely for the purpose of enabling the said Homer I. Watts to take the acknowledgment of the same without calling in a third and disinterested party.

XI.

That plaintiffs have no speedy or adequate remedy at law. That said Vernita Watts is an infant under the age of eighteen years.

WHEREFORE, Plaintiffs pray this Court for a discovery and that the defendants be required and compelled to answer on oath * * *

First, as to whether said deeds were forgeries, or as to whether they were actually signed and executed

by the said Thomas Watts, and as to whether they claim, at the time they were so signed, that he was conscious and in the intelligent exercise of his faculties.

Second. As to what is the arrangement among themselves under which they are operating and possessing said property.

Third. As to what sums they or any of them have received as the rents and profits of said property.
* * * * * * * * * *

And the plaintiffs pray to the Court that a writ of subpoena issue out of and under seal of this honorable Court to be directed to the said plaintiffs, commanding them and each of them, on a certain day and under a certain penalty in the said writ to be inserted, personally to be and appear before this Court and then and there full, true, and perfect answer **make under oath** to all and singular and premises hereinbefore set forth and further to stand to perform and abide such further orders, directions, and decree herein as to the Court shall deem meet and agreeable o equity and good conscience.

Answering plaintiffs' demand, separate answers were made **under oath** denying all the material allegations of the bill.

Prior to the promulgation of the equity rule of 1912, in the consideration of evidence the doctrine universally prevailed in the Federal Courts, that if a

defendant answered a bill under oath, directly and positively denying the allegations of the bill, such answer constituted evidence which required the testimony of two witnesses, or of a single witness with corroborating circumstances, to overcome the force and effect of such answer as evidence.

> Encyclopedie United States Supreme Court Reports, Vol. 5, page 886, and citations therein.

The reason of the rule was exemplified by Chief Justice Marshall as follows:

> "The general rule that either two witnesses or one witness with probable circumstances will be required to outweigh an answer asserting a fact responsive to the bill is admitted. The reason upon which the rule stands is this: The plaintiff calls upon the defendant to answer an allegation he makes, and thereby admits the answer to be evidence. If it is testimony, it is equal to the testimony of any other witness, and as the plaintiff cannot prevail if the balance of the proof be not in his favor, he must have circumstances in addition to his single witness in order to turn the balance.
>
> Clark's Executors vs. Van Riernadyk, 9 Cranch, page 160.
>
> U. S. Supreme Court Rep., 3 Law Ed., page 153.

Under the former rules of practice the complainant could avoid the force and effect of such evidence by waving an answer under oath, the theory being that if the answer was not sworn to it did not become evidence, and it was necessary in order to avoid the effect of such evidence that the complaint especially waive answer under oath.

> Equity Rule 41, Rules of 1842.
>
> Union Bank vs. Geory, 5th Peters, Page 99.

The rule was a restatement of the former practice in chancery.

> Foster's Federal Practice, 5th Ed., Vol 1, Sec. 153.
>
> Cooper's Equity Pleadings, page 325.
>
> Storie's Equity Pleadings, Sec. 874.

Where an answer to a bill in equity is direct and positive and under oath, and denies the allegations of the bill, and an answer on oath is not waived, the complainant **will not be entitled to a decree** unless such denials are disproved by more than one witness, or by one witness and corroborating circumstances; and this is so where the bill is filed for fraud.

> Southern Development Co. vs. Silva, 125 U. S. Supreme Court Rep., 247, 31 Law Ed., page 678.

Where the answer denies allegations of fraud and is responsive to the bill and the relief which is asked

can be granted, these denials must be overcome by the satisfactory testimony of two witnesses, or of one corroborated by circumstances which are equivalent in weight to another.

> Susan Vigel vs. Susan Hopp, U. S. Sup. Court Rep. 26 Law Ed., 765.

The question here presented is whether or not by the promulgation of the Rules of 1912 this rule of evidence has been changed. Foster, in his Federal Practice, 5th Ed., Vol. 1, Sec. 153, page 553, says:

> "Nor do the rules of 1912 prescribe the effect of an answer under oath. Until the matter has been adjudicated the prudent practitioner should follow the former practice and insert in this part of the bill a waiver of an answer under oath, unless he wishes to examine the defendant upon interrogatories, the effect upon which of such a waiver is still unsettled."

We are unable to find where there has yet been an adjudication upon the point, but respectfully call the Court's attention to the case of Campbell vs. N. W. Eckinton Imp. Co., found in the U. S. Supreme Court Reports, 57 Law Ed., at page 1330, and which case was argued and submitted on April 23-24, 1913, and decided June 9, 1913, and at a time subsequent to the promulgation of the Rules of 1912, in which the Supreme Court of the United States approvingly

quotes the former rule and makes application of it to the case then decided.

This rule of evidence respecting the sworn answer under the former practice was not confined to bills of discovery alone but was a general rule applying in all cases. In Hughes vs. Blake, U. S. Supreme Court Reports, 5th Law Ed., page 303, the rule is laid down as follows:

> "**A decree can not be pronounced on** the testimony of a single witness unaccompanied by corroborating circumstances against the positive denial by the defendant of any matter directly charged by the bill."
>
> "It may be stated as a general rule that positive statements in a sworn answer in equity proceedings, responsive to the allegations of the bill and relating facts within the knowledge of the defendant, must be received as evidence and are deemed true and conclusive, unless overcome by the testimony of two witnesses, or of one witness with corroborating circumstances, which corroborating circumstances it has been held must be equivalent in weight to another witness. Courts of equity cannot decree against the denials in a sworn answer unless they are overcome by the requisite testimony on behalf of the complainant, but **the bill should be dismissed.**"

The foregoing is a statement of the rule as laid

down in Enc. U. S. Sup. Court Rep., Vol. 5, at page 886, citing in support of the rule decisions too numerous to quote in this brief, but which are respectfully callled to the attention of the Court.

On the absence of willingness that the answer should be evidence against him, a plaintiff in equity must expressly waive the oath of the defendant in his bill.

> Conley vs. Nailer, 118 U. S. Sup. Court Rep., 127. 30 Law Ed., 112.
>
> Dravo vs. Fabel, 132 U. S., 487. Law Ed. 421.

If he fails to do this the answer must be given under oath and is evidence on bhealf of the defendant.

> Conley vs. Nailer, Supra.

The case of Conley vs. Nailer, Supra, was one to set aside deeds, and one allegation of the bill was that the deeds had been procured by fraud and undue influence of the defendant over the grantor. The bill neither required nor waived an answer under oath, but the defendants answered under oath, traversing all of the averments of the bill upon which the prayer for the relief was based, and in discussing the matter at page 115 (30 Law Ed., 112), the Court used the foregoing language.

It will be observed in this case now before the Court that the complainants Crab do not follow Rule 58 of the Rules of 1912, with reference to a discovery,

but in their original bill of complaint call for a discovery **and demand answers under oath to all and singular the premises** set forth in the bill of com-
In such case the interrogatories become part of the pleadings, and the answers of the defendants also become part of the pleadings.

Luton vs. Camp, 221 Fed. Rep., 424-427.

It is the contention of the defendants in this case that complainants have adopted the old rule of practice, and having not only failed to waive answer on oath, but having **expressly demanded answer under oath,** are bound by the answer as evidence in the case.

The new rules of practice do not require the answer to be sworn to. Rule 58 expressly provides the course of procedure to be had in discovery, and by such procedure separates the interrogatories of discovery, from the pleadings. Had the method prescribed by Rule 58 of the new rules been complied with by the plaintiff, there would have been no necessity for plaintiff to waive answer under oath, for by the later rules defendants would not be required to answer under oath, and the answed not being under oath would, of course, not be evidence against the plaintiffs. But since the plaintiffs have seen fit to embody interrogatories in the original bill of complaint and have themselves in said complaint and by subpoena ad respondendum **required** and **demanded** of the defendants an answer uider oath, and the de-

fendants having so answered, we are constrained to assert that it is incumbent upon them to overcome the weight as evidence of such answers by the testimony of two witnesses, or at least of one witness and strong corroborative circumstances.

The remaining question upon this point is the examination of the testimony to ascertain whether or not this has been done; and we respectfully subit, of Your Honors please, that it has not. The testimony of plaintiffs' first witness, William David Parker, (pages 110 to 115, Transcript of Record) relates solely to the destruction of the former will and to the physical condition of the deceased, all occurring some time prior to the execution of the deed in controversy.

The testimony (pages 115 to 120 of the Transcript of Record) of the physician, Dr. Douglas McIntyre, next witness called for the plaintiffs, describes the physical condition of the deceased sometime prior to the execution of the deeds, and the only testimony therein of importance is the statement found on page 118 in which the doctor says: "I don't believe if he had been left to his own initiative that he could have very well planned out anything that was at all cimplicated at any rate."

The next witness called for the plaintiff, Clarence Skelton, testifies (pages 120 to 123) that he had not seen Watts (page 122) since September or October, 1913; that often long prior to that time he gave

the deceased electric treatments, and that Watts frequently mentioned that he wanted his children to share alike in his property "from the way I understood him all the time."

The next witness called by the plaintiff, Viola Etta Wheeler, a daughter of the plaintiffs, gave testimony (pages 123 to 127) respecting the destruction of the will, and testified (page 125) that she had heard the deceased say to her father and mother, "Now on my word and honor there will be no papers and the property will be divided equal"; and on page 126, "I opened the stove and helped him up and he put it in (referring to the will), and he said, 'Now it is done and the property will be divided equal.' "

The testimony of plaintiffs Jerusha Crab and John Crab is much to the same effect. But none of them testifies to any knowledge in any manner directly supporting allegations 5, 6, 8 or 11 of their bill of complaint, and certainly not of any knowledge either of facts or circumstances sufficient to overcome the sworn answers of the defendants making denial of such allegations.

DUTY OF THE COURT TO DISMISS BILL

An exception to an opinion of the Court is only necessary when the alleged error could not otherwise appear upon the record.

Macker vs. Thomas, 7 Wheaton, 530. 5 L. Ed., 515.

Errors apparent on the record may be considered by the appellant Court, though not objected to in the Court below.

Macker vs. Thomas, Supra.

Baltimore R. Co. vs. Trustees of Sixth Presbyterian Church, 91 U. S., 127-130. 20 L. Ed., 260.

It was the duty of the Court to dismiss this bill, though objection was not made to the ruling of the Court upon plaintiff's motion.

Courts of Equity cannot decree against the denials in the sworn answer unless they are overcome by the requisite witness on behalf of the complainant.

Seitz vs. Mitchell, 94 U. S., 580. 24 L. Ed., 179.

Railroad vs. Mellan, 40 U. S., 112.

The bill should be dismissed where denials of the answer are not overcome by proper proof.

Morrison vs. Durr, 122 U. S., 518. 30 L. Ed., 1225.

Board of Public Works vs. Columbia College, 17 Wallace, 521. 21 L. Ed., 685.

In Latta vs. Kilbourn, 150 U. S., 524, 37 L. Ed., 1169, the Court said:

> "The defendant in his answer, which **was called for under oath,** positively and in direct terms denied the allegations of the bill * * * *

under the well settled rules of equity pleadings and practice his answer must be overcome by the testimony of at least two witnesses, or of one witness with corroborating circumstances."

SECOND

Were the deeds secured by fraud, undue influence or deception, and not made as the intelligent and voluntary act of the grantor.

IN FIDUCIARY RELATIONSHIP.

Burden of Proof

The allegations of the complaint in this cause are very ingeniously drawn and drawn with a view of establishing the fact that Homer I. Watts, the Attorney who drew the deeds, and Marvel Watts, the other brother, at the house of whom Mr. Watts had made his home, are the real beneficiaries under the deeds. Doubtless the complaint was so drawn with the idea of establishing a fiduciary relationship as existing between the father and sons, as such beneficiaries, and by so doing declare the deeds prima facia void and cast the burden of proof on defendants, under the Oregon Rule of Fiduciary Relationship. We faail to find where there is the slightest evidence tending to show that either Homer I. Watts or Marvel Watts are beneficiaries under the deeds. True, they are tenants, still farming the land under the same conditions, practically, that they have been

farming the lands under lease from Thomas J. Watts for a long number of years prior to his death. The rents have gone directly to the grantees named in the deeds and have been accounted for as strictly as though they were accounted for to Thomas J. Watts during his life time. Aside from the sworn answers, each and every of the defendants testified positively that there is not now and never has been any understanding, agreement or conversation between them whereby the title to the lands, or any interest therein, should ever be acquired by either Marvel Watts or Homer I. Watts, no evidence to the contrary has been offered by plaintiffs, therefore we cannot concede in this case that either Homer Watts or Marvel Watts occupied that confidential relation with the deceased, or interest in the result of the deeds, which is necessary to bring them, or either of them, within the general rule announced by the Supreme Court of this State in the case of Jenkins vs. Jenkins (66 Ore., at page 17), to the effect that a gift obtained by any person standing in the confidential relation to the donor is prima facia void and the burden is generally upon the donee to establish to the satisfaction of the Court that this was the free, voluntary and unbiased act of the donor. The position of Homer I. Watts is directly the reverse. He was informed by his father that he was to receive no interest in the lands (Page 157, Transcript of Record). Reasons were given why, he was expressly requested and directed to draw the instruments and his father placed him upon honor that he would not cause

any trouble by reason of the manner in which he disposed of the property by deed (158).

True, his father advised with him as to how the deeds should be drawn in order to protect his life interest, but his instructions as to the manner in which he wanted to dispose of his property were peremptory, thoroughly understood, discussed at different times and the reasons fully given to Homer I. Watts why neither he nor his brother should receive or take any of the lands described in the deeds. It cannot be said that either Homer I. Watts or Marvel Watts were the agents of the grantees in the deed while they were being procured, or in the process of the procuring of the deeds to be executed.

Homer Watts acted solely and exclusively under the directions and at the instigation of his father (156). Marvel Watts had no knowledge that the deeds were to be executed, or that they were executed until they were delivered to him next day (197). Neither Vernita Watts (243) nor Jennie Anderson Watts knew anything of the disposition of the property until after the deeds had been fully executed.

POINTS AND AUTHORITIES.

Burden of Proof.

Even though a fiduciary relationship existed between the deceased and any or all of the defendants, the Court was in error in finding and holding (page 90, Transcript of Record) that the burden of proof

was cast upon the defendants to prove the validity of the deeds.

"The burden of proving undue influence in a gift from an aged woman to daughters with whom she lives alternately, rests upon the plaintiff who brings the action to set the gift aside."

Towson vs. Moore, 173 U. S. Sup. Ct. Repts. 17. 43 L. Ed., 597-600.

Mental Capacity.

"Neither age nor physical weakness and debility, nor disease of the body, will affect the capacity of a person to make a valid testamentary conveyance if sufficient intelligence remains so that such person understands the nature and effect of the conveyance."

Meyer vs. Jacobs, 123 Federal, 900.

Bowdoin College vs. Merritt, 75 Fed., 480-487-492.

"In determining the competency of the grantor to execute a deed, the question is not whether or not his mental powers were impaired or whether or not he had ordinary capacity to do business when he executed it, but whether or not he had any—the small-

est—capacity to understand what he was doing and to decide intelligently whether or not he desired to do it."

Sawyer vs. White, 122 Fed., 223.

Mann vs. Kane, 86 Fed., page 51.

Ragan vs. Sabin, 53 Fed., 415.

"That the grantor in a deed was in a declining state of health and his constitution greatly weakened when he executed the deed does not necessarily imply an absence of sufficient capacity to dispose of his property by gift or otherwise."

Ralston vs. Turpin, 129 U. S., 663-670. 32 Law Ed., 747-750.

"Mere mental weakness will not invalidate a contract or gift unless the grantor or donor be **non compos mentis.**"

Bigelow on Fraud, 281.

"Where a testator at the time he executes his will understands the business in which he is engaged, has knowledge of his property and how he wishes to dispose of it among those entitled to his bounty, he

possesses testamentary capacity, notwithstanding old age, sickness, disability or extreme distress."

In re Diggins Estate, 76 Ore., Page 341-345.

"Not every degree of insanity of a testator will vitiate a will, and though he be enfeebled physically and mentally, if he can understand at the time of the execution of the will what he is doing, has knowledge of his property and how and to whom he wishes to dispose of it, and remembers those who have claims on his bounty, he is of sufficient testamentary capacity."

Stevens vs. Myers, 62 Ore., 372-381.

"One in such mental condition as to understand what he is doing, recall what property he owns and intelligently select the object of his bounty, possesses testamentary capacity."

In re Hart's Will, 65 Ore., 263-265.

The deceased, Thomas J. Watts, was possessed of a disposing mind.

Opinion of Judge Wolverton, Transcript of Record, 94.

Undue Influence.

"Confidential relations existing between the parties to a transaction do not alone furnish any presumption of undue influence to defeat a conveyance * * * * something more than the natural influence springing from such relationship must be shown, imposition, fraud, importunity, duress or something of that nature must appear."

Mackall vs. Mackall, 135 U. S., 167-172. 34 L. Ed., 84-86.

"The undue influence for which such transaction will be set aside must be such that the party making it has no free will, but stands **in vinculis.** It must amount to force and coercion destroying free agency."

Conley vs. Nailor, 118 U. S., 127-134. 30 L. Ed., 112.

"It has more than once been recognized by this Court that the influence for which a deed will be annulled must be such as that the party making it has no free will, but stands **in vinculis.**"

Towson vs. Moore, 173 U. S., 17-22. 43 L. Ed., 593.

Mackall vs. Mackall, 135 U. S., 167-172-173. 34 L. Ed., 84.

Ralston vs. Turpin, 129 U. S., 663-670. 32 L. Ed., 747.

"Influence gained by kindness and affection will not be regarded as 'undue' if no imposition or fraud be practiced, even though it induces one to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made.

Mackall vs. Mackall, U. S. Sup. Court Repts., 34 L. Ed., 84-86.

"It is not influence, but **undue** influence that is necessary to overcome a will."

Beyer vs. LeFever, 186 U. S., 114-124. 46 L. Ed., 1080.

"The undue influence which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor. The affections, confidence and gratitude of a parent to a child which inspires a deed or gift is natural and lawful and will not render it voidable unless that influence has been so used

as to confuse the judgment and control the will of the donor."

Sawyer vs. White, 122 Fed. Rep., 223.

"Undue influence must destroy free agency. It is well settled that in order to avoid a will (or deed) on the grounds of undue influence it must appear that free agency was destroyed and that his will was overborne by excessive importunity, imposition or fraud, so that the will does not in fact express his wishes as to the disposition of his property, but those of the person exercising the influence."

Mackall vs. Mackall, Supra, page 86.
Meyer vs. Jacobs, 123 Fed., 900.

"Whatever rule may obtain elsewhere, we wish it distinctly understood to be the rule of the Federal Courts that the will of a person found to be possessed of a sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence."

Beyer vs. LeFever, 186 U. S., 114. 46 L. Ed., 1080-1085.

An unmarried man seventy-seven years of age

and in feeble health, deeded his farm to his nephew on the expressed consideration of $1.00 and other considerations, the deed reserving to the grantor a life estate, * * * * * * * subsequently the grantor returned to the farm and commenced suit for cancellation of the deed. He was shown to have been mentally competent and there was no evidence of coercion or undue influence. The deed was sustained.

McElroy vs. Mastuson, 156 Federal, 36.

"To invalidate a will on the ground of undue influence, it is not sufficient to show that a party benefitted by it had the motive and opportunity to exert such influence. There must be evidence that he did exert it and so controlled the actions of the testator to such an extent that the instrument is not his will."

Hubbard vs. Hubbard, 7 Or., page 42-46.

"Undue influence sufficient to set aside a will must be such as to overcome the free volition or conscious judgment of the testator, and to substitute the purposes of another instead, and must be the efficient cause of the disposition of his property."

In re Diggins Estate, 76 Or., 341.

THE TESTIMONY.

Mental Capacity

Concerning the mental capacity of the deceased, we briefly quote from the Transcript of Record:

SAMUEL HUTT testified: Got acquainted with Thomas J. Watts in 1902. Saw him once or twice a week when he was in Athena; sometimes may be oftener. Saw him in an automobile on Main Street in Athena in front of Hawks' Drug Store at a time after he was brought back from Washington and taken off the train at Athena. Watts spoke to him as he always did. Watts was sitting up in the automobile. The witness drove up close to him, leaned over to him and said, "How do you feel, Uncle Tommie?" Mr. Watts answered, "I feel fairly well. I feel good, how do you feel, my boy?" That Mr. Watts always called him his boy. Mr. Watts asked him at that time how his family was. He did not notice any difference in the mental condition of Mr. Watts at that time that he had noted any other time. Mr. Watts spoke to him as he always did and there was nothing at all about his actions or his conduct or his language that indicated he was not perfectly intelligent and in good mental condition. He appeared just the same that day as he ever did to me. (Pages 213-214, Transcript of Record).

GUY JONAS testified: I was a witness to both of the deeds. Signed my own name there on in the presence of Homer Watts and T. J. Watts. T. J.

Watts said to Homer, "Did you fix the papers?" Homer said, "I have got them in my pocket." Homer then read them to his father, who corrected him on one piece of property, saying, "You haven't that right," and described the land himself to Homer. Homer told his father that was the way he had it, and his father said, "Well, go ahead and read them again." Homer read them again and his father said, "That is the way I want them deeds fixed." Homer said "Guy can sign that all right," (referring to witnesses). His father said "That is all right enough." His father kept the deeds in his lap awhile, then handed them back to Homer; told him to give them to Marvell and have them recorded. Watts told him he had enjoyed the ride with Homer. That he had often talked to Watts around the hotel and met him on the streets and talked to him. That he did not observe any difference in the general condition of Watts the day he saw him make his mark to the deeds than when he had noticed before, only that he was sick, complained of being sick. As far as his conversation is concerned, it ran just as it always did ever since I knew him. (Pages 175-176-177, Transcript of Record).

DR. S. F. SHARP: Graduate of medicine from Jefferson Medical College in Philadelphia. Had known Thomas J. Watts ever since about the year 1897. Knew him well. Treated his family the greater part of the time up to his death. Saw him when he returned from up in Washington, about the

12th of April. Watts was very feeble, weak and exhausted, suffering from a general break down. Did not talk to him much that day. Saw him every day thereafter until his death. Saw no change in him until the Thursday after he had been out in the automobile, after which Pneumonia gradually set in and caused his death. Watts always knew him and recognized him. He did not notice any difference in his mind from what it had been a year or two before that time, and he seemed rational, perfectly rational. He noticed Watts was perfectly rational up to about Friday—Thursday or Friday before his death. (Page 192, Transcript of Record). **His mental condition was good.** (Page 193, Transcript of Record).

DAVID TAYLOR: Been a resident of Umatilla County since 1859. Got acquainted with Thomas J. Watts about September, 1870. Saw him often. Met him at church and different places. Associated with him about as much as anyone else in early days. Saw him a good many times after he was divorced. Would call and see him when he was not well. Talked with him in March, 1914, after he returned from California. Watts told him then that if Homer did not look after him better or did not pay more attention to him he did not know that he was satisfied with the will and did not think he was satisfied with the will. Said Marvell's wife would crawl on her hands and knees upstairs to wait on him. That Marvel had no bed room downstairs and that he could not get up the stairs very well. That Marvel's wife was sickly

and that Vernita was not able to wait on him. That he was going to have a talk with Homer and his wife as to why they could not take care of him. Saw him again after he returned from up in Washington to a visit with his daughter. I said "Hello, Uncle Tommie, you are home again?" Watts replied "Yes, I have come back, Dave." Watts said, "I have been out riding. Homer taken me out riding. We started out to the ranch, but didn't get out there though. I am a little tired, but think I am all right after I get rested up." That this conversation with Mr. Watts was in the afternoon. That he saw him again a day or two after that and that Watts then said to him, "I sent for Lizzie today and she came down. I told her if I had ever done her any harm or wrong I was sorry of it and asked forgiveness, and she said she would forgive me," and that Watts further said that he told her if she did not have plenty to keep her as long as she lived he would make arrangements, and he further said "Marvel told me she had plenty and Homer told me she had plenty." He said he didn't know how long he would live, "None of us are going to live very long. We are all getting old." That he could not see any difference in the condition of the mind of Mr. Watts, except that he supposed his mind was growing a little weaker as his body did. That he seemed to have just as good a mind as he ever did, to my notion. That it took Watts a little longer to get out anything, to express it, but that he talked just as rational as he ever did, and that this condition was true the day Watts told him he had taken a ride

with Homer, and was also true of his other conversations he had with him. (Pages 182, 183, 184, Transcript of Record).

LINDEN VINCENT: I had a jewelry store in part of the Hawks' Drug Store. Would see Mr. Watts in the drug store. Would listen to his stories and got pretty well acquainted. Saw him for the last time six or eight days before his death, in an automobile in front of the drug store in Athena. The store where he had his jewelry shop. Had a conversation with Mr. Watts. Mr. Watts told him he had been pretty sick, but was feeling better. "I got outside and I feel brighter." Talked to him several minutes. Mr. Watts gave Byron Hawks, the druggist, an order for something. I went into the drug store and brought out the package which Mr. Hawks had fixed up for Mr. Watts. That the condition of his mind appeared to be very bright for a man of his condition. I would consider it very bright. His conversation was just about the same as usual. I did not observe any difference in his mental condition. He seemed just about the same as ever to me, because I stood there quite a little bit. (Pages 238-239, Transcript of Record).

MRS. HOMER I. WATTS: Became acquainted with Thomas J. Watts in 1904. He lived with her and her husband part of the time. Remembers the occasion of Mr. Watts being brought to her home in April, 1914, from Washington. On the next day, Sunday, his divorced wife was there the greater part

of the day, and also David Taylor. Remembers about Mr. Watts being out automobile riding. That Guy Jonas came to their house. That on the day Mr. Watts was out automobile riding he seemed the same that he always had to me. Didn't notice any change in his mental condition at all until Friday or Saturday, when he began to get rather droopy. On Saturday he didn't seem to realize what was going on and died on Monday. Heard Thomas Watts ask his divorced wife while she was there on Sunday if she was sure she had plenty to take care of her, and she heard her tell him she had, and that if she did not have the boys would take care of her. (Transcript of Record, pages 220-221).

HOMER I. WATTS: On the 14th day of April, 1914, in the afternoon, at home in Athena, I wrote deeds for my father. (Marked for identification Defendants' Exhibits "B" and "C"). His father came to his home from Jerusha Crab's on the 11th day of April, 1914, was given a bath by the witness and told him about the will being destroyed, and among much other conversation said, "I have made up my mind what I am going to do with my property, as I suggested some time ago; that is, going to give a part of it to your mother and I am going to provide for Vernita because she is a cripple, and Marvel's wife. The balance of it I am going to leave to pay up the debts, and I hope you children will get good friends, because you all have enough property. Let property not divorce you children any longer." That was on

Saturday evening, and he further said, "I want your mother to come over tomorrow." The witness overheard part of the conversation between his father and mother. His father said to his mother, "Now Lizzie, your time and my time for life is not very long. I have made up my mind to provide for you so you will not want. My suffering during the last years has been intense. I want you to have every care that can be cast upon you," and asked her forgiveness, and she asked the same thing of him. His father wanted to know of her how much property she had and she told him she had plenty to keep her, and that the boys had been good to her, and that she did not know that she cared about property at all. She said, the children that have made it are entitled to it and I would just let it go that way. That the same evening or the next morning his father stated to him that he had thoroughly decided what he would do with his property, and wanted him to fix the deeds. Is under the impression that on Monday morning (or it might have been Tuesday morning) I asked him to go down town with me, if he would not go. He said he wanted me to—why couldn't I fix them up and bring them up there. He said that he had intended to give the lower place, that is, the 320 acres that was deeded to Vernita, to my mother so that she could have the income of it during her life time, and the remainder over to the little girl. His father then directed him how he wanted the deeds drawn. He wanted to deed some land to Vernita be-

cause she was a cripple and she has been closer to me, possibly, than anyone else in life during my old age, being around me so much; and he wanted the other deed fixed so that Marvel's wife would take the title to the property, and I will take the income off of it, because that will be plenty to keep me, and that there would be 80 acres left with which to pay the debts, and said, "Now Homer, Jerusha understood how the property is to go and why she is not getting any of it, because it has been a mutual understanding that she got her property from Uncle Marvel. I want you to attend to it and attend to it right." About eleven o'clock Tuesday came back to take father to the office and fix up the deeds, expecting to get LeGrow to draw up the deeds or to witness them. Got nearly to the bank, saw LeGrow leaving. Continued for a ride a distance of about five miles. Talked with father at some length about the property. Got back home between twelve and one. His father was placed in the chair by the stove where he ate his dinner. When he started away his father asked him to bring back the deeds. I read each deed separately. Discussed the deeds with him,—the description of the property. His father said, "That is the way I wanted the property fixed." His father took hold of the pen, but his hand was crippled and he said to witness, "Write the name for me." His father gave the deeds to him and told him to give them to Marvel Watts or record them. That he took the deeds to his office and gave them to Marvel the

next day. (Pages 149, 150, 151, 152, 153, Transcript of Record).

He further testified that when he and his father went out to the Mansell sale, about the first of March, his father told him he was going to give Vernita some property. That either on the Sunday evening or Monday morning when his father told him how he wanted deeds written he said to him, "Homer, you have no children and Vernita is the only grand child I have here, and she is a cripple, and I have been wanting them to doctor her some, and offered to pay her doctor bills if they would doctor her more. I am willing to doctor that girl." He further said to witness, "You can make it first rate in life, you are getting along well," and further said, "Marvel's wife has been better to me than ever my mother was and she is certainly entitled to something for the kindness she has shown me." That his father had made up his mind absolutely, without any suggestion on his part. (Pages 173, 174, Transcript of Record).

MARVEL WATTS: Mentally I did not see anything the matter with him at all. His physical condition, of course, was not very good. (Page 200, Transcript of Record).

GEORGE WINSHIP: Employed in the First National Bank of Athena; knew Thomas Watts ever since he was old enough to remember; saw him the last time two or three days before he died. Saw Mr. Watts sitting in Homer's car in front of the drug

store. Watts told him he was taking a ride. "I think we will go out on the reservation." He just talked to me just the same as he ever did since I have known him. (Pages 250, 251, Transcript of Record).

A desire to remember Vernita Watts and Jennie Anderson Watts was expressed prior to going up into the State of Washington.

TESTIMONY.

HOMER WATTS: When I and father went to the Mansell sale about the first of March father said he was going to give Vernita some property. (Page 173, Transcript of Record).

MARVEL WATTS: It was the summer before he went to California when father asked him what he thought of remembering the wife of witness, and also spoke about the mother of witness. (Page 198, Transcript of Record.)

A firm mind that Jerusha was not entitled to share in his property.

The Will of 1899.

B. B. RICHARDS: Am Justice of the Peace and City Recorder. Saw Watts almost daily. Drew a will for him in the fall of 1899. The will provided that Jerusha Crab should receive $100.00. (Page 215, Transcript of Record).

The Will of 1905.

WILL M. PETERSON: I drew a will for Thomas

J. Watts on the 25th day of November, 1905. The will gave Jerusha Crab $10.00. (Transcript of Record, page 222).

The Will of 1910-1911.

B. B. RICHARDS: I drew another will for T. J. Watts in 1910 or '11. It left Jerusha Crab less than $500.00. Dr. Newsom was one of the subscribing witnesses. (Page 216, Transcript of Record).

G. S. NEWSOM: Two Hundred Dollars was left to Jerusha Crab in this will. (Page 217, Transcript of Record).

JERUSHA CRAB: The will was in very large print-hand write—and I could read it all. I stood behind his chair and saw every word that was in it. It gave me $200.00. (Page 132, Transcript of Record).

Testimony.

JENNIE BARRETT: Am the wife of Senator Barrett. Have known Thomas Watts since I was about thirteen years old. Watts told me he had made his will, had given his property to Homer and Marvel, share and share alike. The first wife died, leaving a little girl who had inherited what one of his brothers had left. (Transcript of Record, 237).

Dr. S. F. SHARP: Heard Watts speak about what he was going to do with his property in the latter part of his life, and that he would speak about giving it to the boys except a little he was going to

give to his daughter. Heard him speak about it several times. (Page 193, Transcript of Record).

WILL M. PETERSON: Watts told me at the time I drew his will that his brother had raised his daughter, Jerusha, and that the brother would make or had made some provision for her. (Transcript of Record, page 222).

DAVID TAYLOR: Watts said he did not consider that Jerusha should have an equal share in his property and that as he remembers it Watts told him he had given her $200.00 in the will, and divided the balance of the property equally between the boys.

HOMER I. WATTS: Deceased said to witness, "Now Homer, Jerusha understands how the property is to go and why she is not getting any of it, because it has been a mutual understanding that she got her property from Uncle Marvel. (Pages 151-152, Transcript of Record).

Reason why property was deeded to Vernita and Jennie Anderson Watts:

TESTIMONY.

DAVID TAYLOR: I heard Watts say that Marvel's wife would crawl up the stairs on her hands and knees to wait on him when she was not able to do so, and that she would do everything she could as long as she had strength. (Transcript of Record, page 184).

HOMER I. WATTS: Father said he wanted the deeds drawn, saying that he would deed some land to Vernita because she is a cripple and that she had been closer to him possibly than anyone else in life during my old age, being around me so much. (Page 151, Transcript of Record). Homer, you have no children and Vernita is the only grand child I have here and she is a cripple, and I have been wanting them to doctor her more, and offered to pay her doctor bills if they would doctor her more. I am willing to doctor that girl. And further said to witness, Marvel's wife has been better to me than ever my mother was and she is entitled to something for the kindness she has shown me. (Transcript of Record, Page 173, 174).

ARGUMENT.

It needs no citation of authorities to support the proposition that a person of legal age and possessed of mental capacity to understand the nature of a transaction, may dispose of his property during his life time by gift or otherwise, to whomsoever he pleases. Heirs have no rights except in property possessed by the deceased at the time of his death. He may during his life time and while possessed of the necessary faculties dispose of his property by gift, even to the extent of beggaring himself and depriving his family thereof. He may make certain persons the beneficiaries of his generosity to the entire exclusion of others and may select whomsoever he pleases as the objects of his charity.

The instruments appear to be regularly executed and the District Court found them to have been executed by the deceased, and that he was probably of a disposing mind, and the pivotal question to be determined is largely—in fact, almost exclusively—one of fact, to be determined by the Court from the evidence in the case as to whether or not the deeds were the offspring of the mind of Thomas J. Watts at the time he caused them to be executed, and whether or not at that time he fully understood the nature of the transaction and acted of his own free will, without influence from outside sources.

It is true and admitted in this case that the old gentleman was advanced in years, eighty-two years old, very feeble in body at the time of the execution of the deeds, but it seems apparent from the overwhelming testimony in the case that he disposed of the property just as he wanted it to go. That others may have had an opportunity of trying to influence him seems to us to fall far short of any proof that they did do so. As said in Beyer vs. LeFevre, supra:

> "Whatever rule may obtain elsewhere, it is the rule of the Federal Court that the will of a person found to be possessed of a sound and disposing mind and memory will not be set aside on evidence tending only to show a **possibility** or **suspicion** of undue influence."

And we submit that the most that appears in this case is an opportunity, or possibility, for defendants

to have exerted such influence had they so desired. Proof that they or any of them did do so is entirely lacking.

We will first discuss the relations existing between the old gentleman and the plaintiff, Jerusha Crab. When we take into consideration the fact that his home was never her home, that she was never really a member of the family who resided upon the lands in controversy or who helped to improve or accumulate them, we have one reason why, in the mind of the old gentleman, it was not proper that she should inherit or receive part of those particular lands. T. J. Watts had often expressed himself as believing that the boys, who had helped accumulate the property, should receive this particular property.

When we further consider that it was the understanding that the uncle of Jerusha Crab, Marvel Watts, was to leave to her, and did leave to her, a large portion of his property; that all of her services during her girlhood and early womanhood were devoted to his care and his comfort and the upbuilding of his property, rather than to the property of deceased, we find another reason why Thomas J. Watts should consistently say to himself and to others that she was not entitled to receive the property which he and the boys and his second wife had accumulated.

It is a cardinal principle of interpretation of the acts of a donor that former expressions with respect

to the disposition of his property may be taken into consideration and have a strong bearing upon the validity of an instrument executed under circumstances similar to these in controversy.

A strong circumstance tending to show,—in fact, to our minds, one which does conclusively show that the donor, T. J. Watts, never intended that his daughter, Jerusha Crab, should receive any of the lands now in controversy is that repeated wills have been made wherein her name was mentioned and in each instance excluding her from any substantial participation in the property involved here.

Let us briefly refer to the wills and their contents: The first will was made in .1899, when Mr Watts was undoubtedly in vigorous health and of clear and intelligent mind and memory, unaffected by the ravages of any disease. This will was executed before B. B. Richards at Athena and by the terms of this will Jerusha Crab was given one hundred dollars, and no more. Certain provisions are made for the then wife of T. J. Watts, and the remainder of the property was distributed among the boys. None of the relatives or others were present at that time, and it must be conclusive that the old gentleman at that time acted freely and voluntarily, and knowingly disposed of his property without any substantial remembrance of Jerusha Crab.

The second will was made on the 25th of November, 1905, and was executed in like manner before

Will M. Peterson. This also was made at a time when there is no question of the capacity of Mr. Watts to dispose of his property in the manner he desired. At that time, some six years later than the first will, he still had in mind that Jerusha Crab should not participate in his property to any material extent, and provided that she should receive ten dollars and no more.

This is particularly remembered by Mr. Peterson, because at that time Mr. Watts explained fully why he did not intend for Jerusha Crab to receive any more. She had inherited or was expected to inherit a large estate from her uncle and the maker of the will went into detail, fully explaining his reasons for the small amount bequeather to her.

And again, a third will was executed before B. B. Richards in the fall of the year 1910. Mr. Richards in his testimony does not remember definitely the date, but says it was in the fall of 1910 or 1911, but he executed it, as described by the witness Jerusha Crab herself in her testimony at page 113, where she says she read the will over Mr. Watts' shoulder, and the date was November 25, 1910, and that the amount left to her was $200.00, and the remainder was to be divided between the two boys. Thus, some five years later than the second will, a third will was executed, and at this time Jerusha Crab was given $200.00 and the real property was divided between the two boys, Mr. Watts and his second wife having separated in

the mean time, and provision having theretofore been made for her through settlement.

Thus from 1899 up to the last of 1910 we have three written instruments from T. J. Watts, in which he has fully expressed his intention of disposing of his property without Jerusha Crab receiving any substantial part thereof.

Aside from these written expressions, we have repeated statements made by Mr. Watts of his intentions respecting Jersusha Crab, and made to persons entirely disinterested and who can have no interest in this case whatever other than to tell the exact truth. We will first refer to the testimony of Mrs. Jennie E. Barrett, wife of the Senator, Charles A. Barrett, and an old friend and acquaintance of the deceased Thomas J. Watts. She testified in substance, beginning on page 555 of the abstract of testimony, substance at page 237, Transcript of Record:

I have been acquainted with Thomas J. Watts since I was thirteen years old. He talked with me about his children and his property.

And at page 556 she answered: After he was separated from his wife, his second wife, he came one forenoon by the house and I was in the yard working; he stopped to talk with me as a neighbor would and he said he had made his will; first he was telling about being left alone and he said that at first his wife was not satisfied with the will, so the boys

told him to give her what would please her; he said that he had arranged it to please her and that what he had left he should give—had made his will and would give it to the two boys, or had given it to the boys Homer and Marvel, share and share alike. He said that when his first wife died he had a little girl and that his brother and his wife had no children, that they had asked him to let them take the child and that if he would let them adopt it they would make it their heir and give it their property as if it was their own child, and he had consented to do so and that was the reason he was giving to the boys what he had left. That she had inherited what his brother and his wife had left when they died, and for that reason he would not give her anything.

We next beg to cite Your Honor to the testimony of David Taylor, an old and respected pioneer of this County, a man without the slightest interest in this cause other than to tell the truth, a man who had had an intimate personal acquaintance with the deceased and church affiliations and associations with him practically from the date of Watts' first arrival in the County in 1870 up to the very date of his death.

Mr. Taylor had a talk with Mr. Watts after his return from California the last time and before he went to visit his daughter Jerusha, in the spring of 1914, in the month of March, 1914. We refer to page 305 of the record of evidence, page 180, Transcript

of Record. The witness testified in substance in part:

He talked on and he told me about making a will. Did not say when he made the will. He went on and said he had made a will and it was down in the bank. He said he had willed, as I understood it, he willed that girl that lives in Palouse $500.00, and Homer and Marvel the rest equally divided between them; that was the will. And he said if Homer did not look after him better or pay him more attention that he did not know that he was satisfied with the will; he didn't think he was satisfied with the will. He talked quite a bit and he said that Marvel's wife would crawl on her hands and knees upstairs to wait on him, and we talked on just that strain.

And on page 313, Transcript of Evidence, Page 183, Transcript of Record: No, I don't think we ever talked about the will only there at Marvel's house. He told me he had made a will and told me what was in the will.

Q. Now did you ever have any talk with him about the daughter Jerusha?

A. Yes, sir.

Q. And his feelings toward her, talk about that?

A. The way I have got it in my noggin is, the first wife died when that girl that lived in Palouse was about three years old, and his brother said he would take that child and adopt it and raise it and make it

an heir of his. He said his brother had a section of land somewhere down there, and he kept the girl and raised her and he said the girl had a good deal of property and the boys helped him raise, had helped to make this property, staid at home and worked, and he thought she was not entitled to it as much as the boys, some thing to that effect. He would talk about it that way, and he said he considered she was the heir of his brother and he did not think it was necessary to give her much of his estate.

Q. Now do you recall about when you had that conversation with him, or would he talk that way more than one time?

A. Well, I should say now it was the time he told me about his will, that same conversation that came up there at Marvel's house.

Q. That was after his return, then, from California and before he made this trip up to Jerusha's?

A. Yes.

And again we call attention to his statement to his old family physician, the one who treated him up to the time of his death and who had treated his family during many years last past, Dr. S. F. Sharp. We refer first to page 356 of the Transcript of Evidence, page 191, Transcript of Record: The Doctor testifies: I have heard him speak about his property.

Q. Well, just state what you recall having heard

him say in the latter part of his life about his property.

A. He used to speak about giving it all to the boys except a little he intended to give to his daughter.

And on page 357:—Page 193 of Transcript of Record:

Q. Then at the time of his own death he had how many children surviving him?

A. Two boys left.

Q. Are you acquainted with Jerusha Crab, his daughter?

A. Yes.

Q. How long in his life, if you recall, did he talk to you about what he would do with his property?

A. He spoke about that several times during the last years before he went to California, to me.

Q. Now did you ever hear him say anything different about the matter than what you have already testified?

A. No.

Thus we have numerous instances, both in the form of written wills on three different occasions widely separated from each other, and conversations ranging from the year 1899 up to the month of

March, 1914, and within thirty days of his death, wherein he had expressed the firm conviction that Jerusha Crab was not entitled to receive any material amount of his property, and this in itself would require and take strong evidence to effect its overthrow and cause a change to be made within a period of a few days, wherein and whereby he should be led to conclude that Jerusha Crab should share equally with others in his property. These often expressed opinions show a fixed and settled purpose, at least with reference to his feeling and attitude toward the plaintiff Jerusha Crab. It was not that he had any hatred toward her. It is not such a condition that might call forth an expression of forgiveness for some wrong, either fancied or real, and cause him to divide his property that way as a matter of restitution or forgiveness, but it was a firm conviction brought about in his mind from a full knowledge of all of the situation, and after long thought and deliberation, and with a full realization that Jerusha Crab's home had ever been elsewhere. That she had received from her uncle, to whom she had given her early life services, a large portion of his estate, augmented, doubtless, by the fact and knowledge that after her marriage to her husband they had accumulated a large amount of property and were well-to-do, which caused him to believe that it would be unjust for her to share in his property to any material extent.

He doubtless also during all of these years bore

in mind the fact that he and his second wife, the mother of his boys, together with the boys, had spent many days of hardship, toil and deprivation in building up the home places in Umatilla County, and had a full realization that the boys should be entitled to it rather than her. And yet there came a time, no doubt after strong solicitation, pleading and manouvering upon the part of the daughter, accompanied, perhaps, by threats of litigation fostered by expressions, possibly, of ill will between the boys and the daughter, which led him to believe, as he subsequently expressed himself, that each of his own children would be better off if the property were disposed of to some one else who, at least in a measure, merited his benificence, and both the boys and the girl were left without an opportunity, as he conceived it, for litigation, ill will and hatred over the disposition of his property after his death, and imbued with this belief, it was but natural that he should seek for and find what, in his mind, seemed to be a proper and just disposition of his property and a method of disposing of it which would forever, as he conceived it, prevent litigation and turmoil.

There is some evidence that the will which he then had in the bank at Athena and with which he seemed to be perfectly conversant was not satisfactory, not as we view it, because it did not provide sufficiently, in his opinion, for the plaintiff Crab, but, for one reason, because he felt that Homer and his wife were not treating him right. Another rea-

son that doubtless passed through his mind was the feeling just referred to, that much ill will between his children might be avoided if the property were placed elsewhere. While he doubtless felt that Homer and his wife were not entitled to receive any of his property, he perhaps also felt that it would not be just to give either of his other children any of the property and leave Homer entirely out.

We are not left entirely to conjecture in this matter. In March, 1914, and just before he went on his last visit to his daughter Jerusha, he gave expression to his thoughts with reference to this matter in his conversation with David Taylor, page 305 of Evidence, page 181 Transcript of Record, in the following language:

"He said he did not know what was the matter with Homer, Homer Watts and his wife; he said Homer did not seem to take any interest in him, did not care for him; he passes along going up home and he don't come in to see me, and he says, I'm going to have a talk with Homer and his wife and see what is the trouble. He talked on and he told me about making a will, didn't say when he made the will; he went on and said he made a will and it was down in the bank * * * And he said if Homer didn't look after him better or pay him more attention that he did not know as he was satisfied with the will. He didn't think he was satisfied with the will."

Here is a clear expression of the reason that he

was not satisfied with the will; he was not satisfied with the portion that Homer was getting, not satisfied that Homer should receive any of his property by reason of Homer's treatment of him.

This conversation, it will be borne in mind, took place just immediately prior to his going to his daughter's the last time, but it seems that this was not the only time that such feeling entered the mind of Mr. Watts. Dr. Sharp, at page 357, page 193, Transcript of Record, testifies:

Well, I never heard him say anything only in regard to Homer and his wife. He didn't like them very well. He didn't like them. He thought they had not treated him quite right.

Q. What is that?

A. He thought Homer and his wife had not treated him quite right. He would often speak about that.

And then, according to the testimony of Mrs. Crab, the very next morning after his arrival at her home, and without any persuasion or talk with her concerning it, he made a request that she send and get the will because it did not suit him. The letter requesting the will was written by Mr. Parker on the 24th day of March, almost immediately after Mr. Watts' conversation with Taylor, in which he expressed a feeling that he was not satisfied the way Homer and his wife were treating him.

Now doubtless there was much talk between the Crabs, or at least some of them, and Mr. Watts during the ensuing days that he remained there, concerning his property. While upon the surface the testimony of Mrs. Crab would show that she was disinterested and was only listening to the old gentleman talk, yet it is not conceivable that this is true. Too much interest is displayed by Mrs. Crab and by her daughter in listening to conversations from the kitchen and from the parlor concerning the property, to believe for a moment that it was immaterial to them what the old gentleman did with his property. Enough was evidently said to cause the old gentleman to expect that there would arise from the disposition of his property a hatred and feeling among his own children which ought to be avoided if possible. Then is it unnatural or unreasonable that he should seek for a method of disposing of it that would best accord with his ideas, and is it unnatural in so doing that his mind should return to the little grand- daughter, the crippled girl who had waited on him for years, who had been his pet, in a manner, about the home of Marvel Watts? He had bought for her other presents, showing his affection,—a Shetland pony I think the testimony discloses, and had told her father to spare no expense to try to cure the invalid girl and to use his money for that purpose. ~~It is~~ Is it unnatural or unreasonable that his mind should turn to the one woman of all others, the wife of Marvel Watts, whom he had

said would "Crawl upstairs on her hands and knees to wait upon him, though she was not able to do so?" To the woman who would forget her own physical weakness in order that she might minister to his wants, and had done so for years? It is the most natural thing to our mind that he should select as the objects of his bounty and as the medium through which he might harmonize his own children, the two persons whom he did select, the wife of his eldest son and her invalid daughter.

The language of Mr. Justice Brewer in the case of Mackall vs. Mackall (U. S. Sup. Ct. Dep., 34, Law Ed., page 87) comes to us with peculiar force at this time. It is this:

> "Right or wrong, it is to be expected that a parent will favor the child who stands by him and give to him rather than the others his property."

And the Chief Justice in the same opinion and in support of the decision in that case makes the following statements:

> "Influence gained by kindness and affection will not be regarded as undue if no imposition or fraud be practiced, even though it induces the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made.

> "Confidential relations existing between a testator and beneficiary do not alone furnish any presumption of undue influence, nor does the fact that the testator on his death bed was surrounded by beneficiaries in his will, nor that the testator, an old and helpless man, made his will in favor of a son who had for years cared for him and attended to his business affairs, his other children having forsaken him."

And the Chief Justice in his own language makes this statement:

> "It would be a great reproach to the law if in its jealous watchfulness over the freedom of testamentary disposition it should deprive age and infirmity of the kindly ministrations of affection or of the power of rewarding those who bestow them."

Evidently the method of disposing of his property and the persons to whom at least a part of it should go by deed had been thought over before Mr. Watts made his last visit to his daughter, for in the early part of March, 1914, and on the occasion when the old gentleman and Homer Watts drove out to the Henshell sale, he was making inquiry of Homer how deeds might be writen to reserve a life estate to one, and was also talking about what property his divorced wife had, and in that conversation he said to Homer that he intended to give Vernita some of his

property, and he asked Homer if Homer would care if Marvel's wife should have some "for the care she has taken of me." (Testimony of Homer Watts, (Testimony of Homer Watts, page 267 of Evidence).

Thus it was in his mind on his return from California that the will was not altogether satisfactory, and one especial reason was that he wanted Vernita to have part of his property and he wanted Marvel's wife to have part for the care she had taken of him.

After his return from Jerusha's on the 11th of April, 1914 upon Homer's having made some remark about his father's condition, his father stated (page 188, Transcript of Evidence, page 150 Record , "The children have had enought differences in the family, I don't want to hear any more of it.

And after a bath had been given him and he had gone to bed on Saturday evening, Homer was sleeping in the same room to care for him, the matter of the disposition of his proverty was again discussed (page 189 of Transcript of Evidence, page 149-50, Record), and the old gentleman in substance said: "I have made up my mind what I am goig to do with my property. I am going to give a part of it to your mother, and I am going to provide for Vernita because she is a cripple, and Marvel's wife, and the balance of it I am going to leave to pay up my debts, and I hope you children will all get good friends, because you all have enough property. Now let property not divorce you children any longer."

That was on Saturday evening and he then said "I want your mother to come over tomorrow"; that would be Sunday. Mother was at Walla Walla and came over on Sunday.

The fact that his wife did come over on Sunday and that he had a conversation with her about making provision for her support, which was partly overheard by Homer Watts, and the fact that the old gentleman made the direct and positive statement to Mr. Taylor, after the divorced wife had been there, about their conversation and about the distribution of his property, shows conclusively and beyond doubt that the old gentleman never destroyed the will voluntarily while at Jerusha's in order that each of his three children might share the property equally. No such thought was ever in his mind, because, as was natural in his last days, his mind reverted to the long years of service rendered to him by his divorced wife and there was uppermost in his mind a thought that she should be properly provided for, and for this express purpose, after he returned home and after, as Jerusha Crab says, he had told her she should have one-third of the property, and immediately on his return home he sent for his divorced wife in order that he might provide for her needs and wants. This circumstance in itself refutes the statement of the contestants that the will was destroyed for the purpose of giving to Jerusha Crab a third of his property, and adds another reason why the will was not satisfactory. The will made no provision for his di-

vorced wife, and doubtless in his failing health his mind reverted to the possibility of her needs. This is evidenced by his anxietv to have her come to talk with him upon this subject immediately on his arrival home, and by his inquiries of both her and the boys as to her needs.

True, after talking with her and after inquiring as to her condition, he ascertained that there was nothing that she needed, and therefore she received nothing, but doubtless the slightest intimation upon her part that she might need or want any part of his property would have called forth from him an immediate favorable response.

We especially call the Court's attention to the talk had between Mr. Watts and his wife, Lizzie, on Sunday, as partly overheard by Homer Watts and as detailed by Mr. Watts to Mr. Taylor in a later conversation. Then, after he had had a talk with his wife Lizzie, and ascertained that she needed nothing, he again had a talk with Homer, either Sunday evening or Monday morning, and Thomas J. Watts stated to Homer (Page 190 of the Testimony, Page 149 Record), that he had then thoroughly decided what he was going to do with his property and he wanted Homer to fix the deeds; stated that he had intended to give the lower place (that is, the 320 acres that was deeded to Vernita) to his divorced wife so that she might have the income of it for her life time, and then the remainder over to the little girl Vernita, but

he went on to state that Lizzie had plenty and that he was going to deed the land to Vernita because "She is a cripple and she needs the property; she has been closer to me possibly than anyone else in by old age, being around me so much," and he said "The Carmichael 80 and the 40 adjoining that, you fix that so that Marvel's wife takes the transfer to the property, and I will take the income off of it, because that will be plenty to keep me"; then he said there was "the other 80 acres there, we will leave that out now to pay the debts with, and I will tell you what to do with it, so that you will know," and he said "Now Homer, Jerusha understands how the property is to go and why she is not getting any of it, because it has been a mutual understanding that she got her property from Uncle Marvel and" he says, "Marvel will have no fuss at all because it goes into the family"; and he says, "I think you children can get along better than you have in the past"; and he said, "Now Homer, you are the only one that is going to cause a lawsuit in this matter, and I want you to attend to it and attend to it right"; and he says (Homer) "I will not cause a lawsuit in this matter if I don't get a pleasant look from this time out; if you don't want any trouble I will cause none."

Now, in accordance with this direct request and in accordance with what had been evidently a preconceived and well studied plan of how his property should finally be disposed of and given expressly and distinctly in detail to Homer Watts, the deeds were

prepared. What more natural than that Homer Watts should prepare the deeds? And what more natural and just disposition could any man under the circumstances have made of his property? The daughter, Jerusha, was well fixed; had inherited $10,000.00 approximately from an uncle's estate, was married and her husband owned property worth at least $50,000, a comfortable home and not in any manner in want. The boys were both grown and both well fixed financially,—not a question of want or need with them or either of them; all three of the children healthy, bright, intelligent persons, all wealthy, far more so than the old gentleman at that time, and no likelihood of any of them ever being in want or need. More likelihood of hard feelings existing between them if the property was given to any one, or even equally to all three of the children. The boys would have believed that Jerusha was not entitled to receive anything, because she had not helped make anything. Were it all left to Marvel Watts, Homer would naturally feel a resentment, and evidently this is so to some extent, even under the present disposition of the property, but holding sacred the promise made his father, he has done just what and is doing what any just and upright man would do to uphold what he knows to be his father's wishes, directions and requests respecting the disposition of his property. Provision was made for Vernita Watts, the cripple girl, **the girl whom the old gentleman said had been closer to him than anyone else in the later**

days of his old age. Provision was made for Jennie Anderson Watts, the one who would **crawl upon her hands and knees upstairs and wait upon him,** though herself in ill and failing health; a remembrance of gratitude rather than a gift to supply their needs, and yet, withall, he reserved to himself the income during his life time from the lands deeded to Vernita, ample for his support. He reserved the 80 acres and the income from that for his support and with which to pay his debts and obligations. Looking at it in the light of all of the circumstances surrounding this case, the disposition of his property shows a remarkable, clear and intelligent mind, and shows such a disposition as one might well approve of in every respect.

We now come to the execution of the deeds. It is always easy to suspicion fraud or to say after a thing is done, if it had been done in some other way it would have been better; yet the execution of these deeds was the most natural and reasonable under the circumstances. If Homer Watts and Marvel Watts had been attempting or had had in mind using fraud for the purpose of securing the execution of these deeds it would doubtless have been done in a very different manner. The eminent counsel for the plaintiff in argument in the District Court said much about the "Saloon Keeper," Jonas, and yet, not a syllable or breath was raised by any person respecting his honesty or integrity; it was not uncommon and not especially disgraceful in days past that one

who was operating a hotel might also keep a bar or keep intoxicants for sale at the hotel, and this is the most that can be said against Jonas. He had been an intimate friend of Thomas Watts during his life time. Thomas Watts had been a friend of his father's. He is an intelligent man and gave direct and positive testimony as to the manner of the execution of the deeds. He acted as a witness to the instruments and perhaps thought no more of the matter until they were called into litigation. The testimony of Homer Watts and of Jonas both show the clearness of the old gentleman's mind at the time the deeds were executed. A miscalling, apparently, of the Township and range when the deed was read over, either that or a misunderstanding upon the old gentleman's part of the words used, caused him to ask them to be reread and to dispute to some extent as to the numbers of his land, showing his mind to have been perfectly and absolutely clear at that time as to what property he owned and how he wanted it disposed of.

Counsel also had the execution of these deeds shrouded in secrecy and mystery. If Homer Watts and Marvel Watts and their wives and Vernita Watts were scheming to secure this property by reason of deeds fraudulently obtained, certainly Homer Watts and Marvel Watts are shrewd enough that they would have had all of the members of their family present and all of them would have been able to testify in the case, and even the nurse, Mrs. Carden,

would have been kept in or about the house if the deeds were executed in pursuance of a plan of fraud. LeGrow, the banker whom the counsel would have the Court believe fraudulently assisted in covering the recording of the deeds, would have been there. The testimony of Watts and Mrs. Carden and of Mrs. Homer Watts all clearly explain why Mrs. Carden and Mrs. Homer Watts were gone just at that time. The testimony of Watts and of Jonas explains how they came to be there and how the deeds came to be executed at the house on that day. If all of the members of the family had been there, and perhaps a half dozen outsiders, we would find the eminent counsel on the other side insisting with greater force that Homer Watts and Marvel Watts had gathered into the household all of their friends in order that they might act as witnesses and help unjustly to deprive the old gentleman of his property. In fact, we do find counsel asserting that the Watts' had gathered a bunch of business men on the street in order that they might meet the old gentleman and testify to his mental capacity on the day the deeds were executed. If these men had not been there we would expect counsel to say: How strange! No one saw the old gentleman.

The manner in which Jonas came to be at the hours on two different occasions is fully explained both by his testimony and the testimony of Homer Watts. Some time previous Jonas had given Watts a note of $300.00 for collection. On the morning in

question Jonas had gone to Watts' office to make inquiry about the note, and not finding him there had walked on up to the house, and while there was informed by Watts that he had received a letter respecting the note, and was asked to come back to the office that afternoon. In the afternoon Jonas went to the office to look after the same matter and to talk with Watts about the collection. From there they together walked up to the house and while there Thomas Watts himself asked Jonas to sign the deeds as a witness. Jonas is now farming in Montana, is a married man of family and the testimony shows him to be an upright, law-abiding citizen, and if he were not so the able counsel would certainly have found people about Athena, where Jonas lived so long, or about Echo, where he was engaged in the butcher business, to show this fact.

Counsel argued in the lower court, and we expect it here, that Mrs. Carden and Mrs. Homer Watts were sent away from the house in order that they might not be present at the time the deeds were executed; but counsel overlooks the fact that Mrs. Homer Watts testifies that she had been told by her husband a day or two before that the deeds were to be made, was told by him a day or so afterward that the deeds had been made, and testifies as to just how and why she came to take the car and take Mrs. Carden home. Mrs. Carden had requested Homer to come home early in order that she might go to her own home and get something or do something. Homer

had promised to do so and was detained at the office much longer than he expected and had arrived home late, perhaps, for Mrs. Carden to go out to her home and return, and Mrs. Homer Watts took the car and took her to her home and then, at her own suggestion, took Mrs. Carden for a ride.

Another matter argued by counsel is the fact that Homer Watts at one time was engaged either for Mable Warner or against her in what he terms the famous Warner-Young will case. There were numerous of these cases, some of them criminal, some of them civil, and some in the Probate Court and some in the Circuit Court, and there is scarcely an Attorney in Umatilla County who was not in some manner or other engaged in the trial of some one of these cases, and one of the eminent opposing counsel in this case was in most of them. It is not shown by the testimony whether or not Homer Watts was attempting to sustain the validity of any one of these wills, but if so, only as an Attorney and in a position similar to that occupied by many other Attorneys in the County. Further, there is nothing in the evidence to show that the LaRoque will was ever procured or induced by fraud. True, the will was set aside, as the court records will show, butso far as we are advised, not upon any grounds of fraud or attempted fraud upon the part of Homer Watts, and so far as any unde influence is concerned, we fail to find anywhere, either in the evidence in this case or outside of it, where any of the defendants in this

case have done or performed the slightest inconsistent or unworthy thing with a view of inducing or in any manner influencing Thomas J. Watts in the disposition of his property. Homer Watts is strictly carrying out a sacred promise made to his father, and neither is this promise an afterthought suggested or made for purposes of this suit.

A letter written by Homer Watts to his sister immediately after the death of his father, is found on pages 580 and 581 of the Transcript of Evidence, and in that letter, written on the 28th day of April, practically within a week after the death of the old gentleman, Homer Watts has this to say to his sister: "I promised Pap that I would retain by peace and cause no disturbance."

We come now to consider the capacity or competency of Thomas J. Watts to understand and comprehend the nature of his act in making these deeds. Bearing in mind the various expressions that he had made to his friends and relatives, which we have hereinbefore enumerated, with respect to his intended disposition of his property, we find the deeds to be substantially in accord with those expressions. One other instance we may cite which was probably overlooked heretofore in this brief, and that is the testimony of Marvel Watts, regarding a conversation which took place between Marvel and his father, along in the summer before he went to California, found on page 376 of the Transcript of Evidence, page 198 Transcript of Record:

"He and I went out to the ranch one day and he asked me what I thought about remembering my wife, and I said, well Daddy, it is just up to you, do as you like, and he also spoke about my mother, and asked me how much money she had and her condition, and regarding her ailments, and I told him, and he wanted to know if I thought she had money enough to take care of her, and I told him I thought she probably had."

So that in sending for his former wife and executing the deeds in favor of Vernita and Jennie Anderson Watts, the act is only following expressions that had been made by him long prior to the execution of the deeds.

It is admitted, of course, that the old gentleman was very weak in body and needed continual assistance. At times naturally he would be drowsy and sleepy and perhaps somewhat dull mentally, but that he was possessed of a clear and intelligent mind up until at least a couple of days after the making of the deeds can scarcely be questioned. The witnesses to this effect who saw him are all agreed, Homer Watts, Guy M. Jonas, David Taylor, S. F. Sharp, his physician, Marvel Watts, Samuel Hutt, Jennie Anedrson Watts, Jane Carden, Linden Vincent, Mrs. Homer Watts, all are persons who saw him after he returned from his last trip to the State of Washington, all who saw him upon the day the deeds were executed, and all testified that his mind was clear

and that he knew what he was doing. Marvel Watts testifies on page 375; Transcript of Evidence:

On the evening of Wednesday, next day after the deeds were drawn, I went over to Homer's house to stay with father or to ask him about staying with him." Note the language used by Mr. Watts at that time: "I don't want anybody; I don't need anybody; when the folks get ready to go to bed turn off the lights and go to bed." "And then he asked me if Homer had given me those deeds (Page 197, Transcript of Record) and I said he had, and he said he hoped everything was satisfactory, and I said, as far as I am concerned it is, and he said, Homer promised there would be no trouble over it, and I told him I didn't think there would be."

Note the conversation had between Homer Watts and T. J. Watts at the time the deeds were executed, how carefully the old gentleman requested the second reading of the deeds in order that he might be sure the numbers were right.

We also note the testimony of Dr. Sharp, the physician in attendance upon him, on pages 358 and 359, Transcript of Evidence, 192-193, of Record; it is in substance: I saw him on the 12th or 13th and every day thereafter up until the date of his death. I was there every day. I may possibly have missed one day, but I do not remember. **His mental condition was good up until Thursday, anyway, and possibly Friday.**

And David Taylor, T. J. Watt's most intimate friend and of almost half a century's acquaintance, a man who we may add is so well known to be of high character that any attempt to add to it by words of ours must necessarily fail, testifies at page 314 of the Transcript of Evidence, 184 Transcript of Record, "Well, I never could see any difference, only his mind, I suppose, would grow a little weaker as his body did, but he seemed to have just as good a mind as he ever did, to my notion. It took him a little longer to get at it, to express it, but he spoke just as rationally as he ever did.

A. Yes, that day and the other conversations too, all of them.

Linden Vincent, a young man of strict integrity, a son of Dr. F. W. Vincent of Pendleton, testified to seeing the old gentleman on the day the deeds were drawn, in an automobile in front of his place of business, and having a talk with him. His testimony appears at page 560 of the Evidence, 238 Record. The old gentleman on that date said to him, "I got outside and I felt brighter," and when Byron Hawks, the druggist, came out he gave him an order for some packages, apparently some medicines of some character, and this was brought out to the automobile and given to Mr. Watts by Mr. Vincent; and on page 562 he testified further:

Q. Did you hear him talk any about automobile riding?

A. No, just as I said, he said that he had got out and he was feeling fresher since he was riding. That is all I remember hearing him say.

Q. Now what appeared to you to be the condition of his mind on that day while you were talking to him?

A. O, very bright for a man in his condition. I would consider it very bright.

Q. His conversation with you was an intelligent one was it?

A. O, just about the same as usual.

Q. Did you observe any difference in his mental condition on that occasion and what you had observed it to be on former occasions when he was there in the drug store talking to you?

A. No, I don't think I did, because I would have remembered it if I had. He seemed just about the same as ever to me, because I stood so quite a little bit.

Mrs. Carden, the nurse, at page 535, testifies:

Q. Now do you remember a day that he was out automobile riding with Homer Watts?

A. I do.

Q. What was the condition of his mind up to that time and perhaps for a day or two subsequent to that time?

A. Well, he was rational up to that time.

Q. Would he know people when they came in?

A. Yes, sir, he did.

Q. Answer questions and ask questions in an intelligent manner?

A. He did.

Q. Seemed to understand all that was going on around him up to that time?

A. Yes.

Many others testified in substance the same, most of them entirely disinterested witnesses, and in view of the overwhelming testimony to this effect, we believe there is no question, under the decision of Sawyer vs. White in 122 Fed. Rep. at page 224, but what the old gentleman at the time the deeds were executed was perfectly competent to determine intelligently what he was doing and whether or not he wanted to do it. In that case Circuit Judge Sanborn lays down the rule to be as follows, supporting it by many authorities:

> "But the question of his mental capacity is not whether or not the powers of his mind were impaired or whether or not he had ordinary capacity to do business, but whether or not he had any—the smallest—capacity to understand what he was doing and to deermine intelligently whether or not he would do it."

And the Court says:

> "Any other test would wrest from the feeble and the aged that power over their earnings and savings which is their best safeguard against misfortune and would produce endless difficulty and litigation."

And in that case, one where the donor was eighty-eight years old and had executed a deed of his property valued at $20,000.00, a case where the Court said the donor was practically helpless and required constant assistance and attendance to enable him to arise from his bed and to procure and take his necessary food and drink, while at other times he was able to walk a block or two with the aid of a cane. He was a feeble old man and his mind was undoubtedly much less active and powerful than when he was young and vigorous, and in conclusion the Court said:

> "The deed cannot be void for lack of mental capacity in the grantor to make it."

We are now led up after the execution of the deeds, to their delivery. The old gentleman had requested Homer Watts on Sunday night and Monday morning to draw and prepare the deeds. This, however, had been communicated to Homer Watts' wife prior to the making of the deeds. On Tuesday, the 14th of April, the deeds were executed. After having been signed the old gentleman retained them for

a time in his possession, and handed them to Homer Watts with a request that he either give them to Marvel or see that they were recorded. The next morning, Wdnesday morning, Homer Watts handed them to Marvel Watts and Marvel requested Homer, inasmuch as Homer stated he was going to Pendleton, to bring them here and have them recorded. On Wednesday evening the old gentleman asked Marvel if Homer had given him the deeds; Marvel replied that he had and that there would be no trouble about it. Homer Watts came to Pendleton, was busy in the trial of a case in court on Thursday and Friday, and either through lack of time or forgetfulness failed to have either of the deeds recorded. Having failed to do so, he informed Marvel Watts of the fact on Saturday morning, and on Saturday morning Marvel Watts took the deeds to the bank and requested the bank in its usual course of business to send them down for record, and this was done.

Counsel make a contention wholly unsupported by the evidence, to the effect that the deeds must have been sent down Monday morning by special messenger, after the old gentleman's death. He died at eight o'clock on Monday morning, and the deeds were filed for record about 11, and it is this undue haste in recording the deeds that counsel would make appear as a badge of fraud. To our minds this creates an inference that the deeds had been delivered to the bank for record prior to the old gentleman's death. After his death there could be no need

for haste in recording. The grantor could not then recall them and either Homer or Marvel would know that any such undue haste was not only unnecessary, but would be a badge of suspicion if the deeds were fraudulent.

If the matter stood alone and without any explanation, it is true that there would seem to have been unseemly haste in placing the deeds of record, but in light of the explanation given by all of the parties connected with the delivery and record of the deeds, the contention is wholly unwarranted and untenable.

By a course of argument not based upon any foundation of fact, counsel undertake to show that because the deeds were not received at the court house until 11 o'clock, that they could not have been delivered by Watts to LeGrow, the banker, and must have been brought to the Recorder by messenger. This is wholly unfounded and unreasonable. The Recorder testifies to his usual course of business in such things, not only with this bank, but all others, in sending deeds for record with a blank check signed, to be filled out by the Recorder without letter or note of explanation, and that upon receipt of such deeds he made a notation thereon to whom they were to be returned. It may be possible that LeGrow did not mail the deeds until Sunday morning, or it may be possible that they were placed in the postoffice and the mail not sent out on Sunday, or possibly they arrived at the Pendleton postoffice and were not distributed on Sunday and that the Sun-

day's mail was not distributed even on Monday morning until after Mr. Burroughs had gotten his mail, as he testifies he often did at the hour of six o'clock and before the postoffice was open or the 8 o'clock Monday morning mail delivered. Any one of these theories is more reasonable than that Marvel Watts and LeGrow and Burroughs would testify falsely in the matter.

In this case there was no reason for haste in recording the deeds after the old gentleman's death. If they had been executed and delivered to Marvel Watts they were perfectly safe and effective without record, and there was no need of haste either before or after Mr. Watt's death.

Homer Watts and Marvel Watts are not largely interested in property and an impression is left, perhaps not intentionally, to the effect that they own some seven or eight hundred acres jointly in Montana. True, they now own lands together, as we understand it, which have been purchased since the old gentleman's death, but at the time of his death and the time of the execution of these deeds, they had nothing in common except that they were farming the lands of Mr. Watts under lease and had been so doing for several years in the past. They continued to farm these lands under the same terms and to turn the rents due to Vernita Watts and to Jennie Anderson Watts. There has been no change in the situation except a change of ownership of the lands

from J. T. Watts to Vernita Watts and Jennie Anderson Watts.

In this connection, too, we call the Court's attention to the testimony of Jennie Anderson Watts on page 522, Transcript of Evidence, 219 Transcript of Record, respecting a conversation she had with "Grandpa Watts" regarding his property, and it is to be noted that each and all of the defendants in this case testify positively that there was no influence exerted by them or any of them to induce the old gentleman to dispose of his property in any manner; that there was no understanding, either implied or otherwise, that the title to the property should ever in any manner be changed so that other of the defendants might receive the benefit therefrom, and there is not a particle of evidence to the contrary, other than that the defendants may have had an **opportunity** to try to influence him. It would be very unusual if such an opportunity were not afforded to members of the family, but mere opportunity to commit a crime is no proof that it has been committed. If the burden of proof does rest upon the defendants to show that the deeds were executed without undue influence upon the part of them or any of them, then we believe this burden has been fully and overwhelmingly met by the evidence, both circumstantial and oral, in the case.

Having now presented to the Court our side of the case, though rather lengthy, we trust the Court will have patience with us while we briefly discuss

some of the features of the case presented by the plaintiffs and their witnesses with respect to what has taken place in the State of Washington. The witnesses there are mostly interested, John Crab and Jerusha Crab, who are the plaintiffs, and Mrs. Wheeler, their daughter. Two witnesses may be said to be disinterested, William Parker, an old acquaintance of Mr. Watts, and the man Skelton. If we had pages of space but little of it would be devoted to the testimony of the man Skelton. The production of such witnesses is in itself an insult to the Court. The mere reading of his testimony supplies the proof of its falsity. A perusal of the testimony of Skelton has the old gentleman speaking of his wife, Lizzie, as a "she devil" and has him going to visit Jerusha when it was "Disagreeable for him at other places," and way back, when Skelton was giving the old man Watts electrical treatment for a consideration, the old man "Many, many times, and almost continually" was shouting to him that he wanted his children to share and share alike in his property. Yet during this time the old gentleman had the will made in the bank by which the children were not to share alike in the property. And this witness compromised his wife's intimacy, according to his testimony, with "Old Watts," took Watts' money, gave it to his wife and afterward lived with her as his wife. We have neither time nor patience with such testimony.

W. D. Parker is a close friend and neighbor of the Crabs, a very old man, yet a man who bears the

impress of honesty. The only part of his testimony that is materially in controversy is his statement wherein he says that the old gentleman said to him while he was there on his last visit, that Jerusha was his child the same as the boys were and he wanted her to have her share of the property; but even in this Mr. Parker is not very positive as to the language, there appears to be many other things that he could not remember connected with the conversation, and the language "her share of the property" has been used so much by Skelton and the Crabs that it has grown familiar to him and we doubt very much whether or not he heard the language from Mr. Watts himself, or whether he has it confounded and mixed with conversations that he has had with some of the interested parties. However, it proves nothing with respect to the later execution of the deeds.

Permit us to briefly refer to the testimony of the plaintiff, Jerusha Crab, and her daughter, Viola Ada Wheeler. The similarity of the language used by each is most remarkable in many important instances, and especially is this true when they both testify in substance that they have never talked the matter over between themselves and that the subject of their testimony has never been discussed between them. This, of course, is unreasonable, and not to be believed under the circumstances.

Taking up first for consideration the testimony of Jerusha Crab with reference to the time that

Marvel took his father up to visit her, after his return from California,—and right here we may say, that if Homer Watts and Marvel Watts were conspiring to get the old gentleman's property they would certainly have made some provision for doing so before he ever went to see his daughter the last time. It is in evidence that they did not know the contents of the will; it is in evidence that the will was first opened by Mr. Watts himself, after he was up to his daughters', and we think it safe to say that if Homer and Marvel were conspiring in any manner to get his property, something more definite would have been done before the old gentleman was permitted to go to his daughter's at all.

However that may be, Mrs. Crab testifies that her father came to her place with Marvel on the 17th day of March, 1914, and he gradually grew weaker all the time until he took that bad spell. That bad spell was the 3rd day of April, 1914. Marvel came back on the evening of the 3rd day of April, 1914, about four or five o'clock. When Marvel got there his father was entirely unconscious. I suppose from the effect of the medicine and partly from the disease (Page 94, Transcript of Evidence). Marvel came up on the Friday evening and staid until the next Monday. I don't thing he (T. J. Watts)) recognized any of them (Page 95).

Q. Well now, at any time between the time that Marvel took him away on the 11th of April was he able t oget out of bed?

A. Not without help. Not without helping him out.

Q. Now, knowing your father as you did, having been around him as you have, and being there with him, what do you say in your judgment as to whether or not between the 3rd day of April, when he took this bad spell, and the time he went away from your place he was ever in a condition so that he could do intelligent business?

A. Oh, no, no.

Now we call attention particularly to this statement of the witness, because later on the plaintiff placed great stress upon the fact that T. J. Watts made them many assurances about the manner of the disposition of his property. If he were not capable at any time of doing any intelligent business, as this witness has testified, they certainly ought not rely upon such business as they claim he transacted or directed while he was in this condition.

Further testifying the witness says that the next morning, which would be the morning of March 18th, her father told her about the will, He said he had made a will and wanted her to send and get it. He said the will "did not suit him," that was all. The letter came later. (It is our impression the documents in evidence show that the will arrived there either the 26th or 27th of March). (Page 98, Transcript of Evidence). He did not burn the will right

there and then. He handed it to me and told me to put it away. I can't say how long it was put away. I put it away in the drawer. One morning he called me and asked if I would get the will. I brought it and handed it to him and he tore it open and read it.

The witness, on page 112, Transcript of Testimony, on cross examination, testifies that the will was put away several days. "I don't remember how long."

In this connection, it would seem a little strange that the old gentleman, who mentioned his will the first morning after he got there, making immediate request to have it sent for, received it a few days later and, without opening the envelope containing it or reading it, have it placed away and allowed it to remain several days. This, we say, is peculiar in view of the fact that the witness testifies that he was crying about the will and always talking about his property. It does not appear reasonable.

Another instance that is inharmonious is where Mrs. Wheeler, the daughter, testifies that she was present when he opened the will, and that neither she nor her mother read the will. Evidently this is one feature of the testimony that they had not discussed, for Mrs. Crab testifies, "I stood right behind his chair and seen every word that was in it. She did not know it, but I stood there a few steps away from him. It was wrote in very large print, hand write, and I could read it all."

Q. And you did read it all?

A. Yes, but I said nothing to her about it. It gave Homer and Marvel equal shares and made them both Administrators. He asked me to burn it and I told him I would not do it, and he said then, as he had said before, he would have to wait for Bill to do it.

Now what is the reason for any such conversation as that? The old gentleman was sitting right by the stove. All that was necessary was to put it in the stove, and according to the testimony, that was what was substantially done. Why all this talk about waiting for Bill in order that he might burn the will? And note the following answer given by Mrs. Crab on page 99, Transcript of Testimony:

Q. Did he say anything?

A. Yes, he said "Now it is done' with a laugh; "You shall have your share equal."

Note the anxiety of the witness also to have the old gentleman perfectly competent up until the time he had the bad spell, and after that to have him so incompetent that he would not be able to execute deeds. The plaintiffs seem to overlook the fact that they are relying upon his being perfectly competent to tell them what he wanted done with his property, and to tell Marvel what he must do.

The witness (page 100) says: Yes, after he came there the last time, and before the will was destroyed

(he was talking a great deal about his property); and going on the witness answered: "After the will was destroyed, before he got so sick that he could not intelligently talk." He said every time that he wanted us three children to divide it equally, wanted myself, Marvel and Homer to have equal shares. The property seemed to be on his mind continuously. If he ever mentioned the will he cried until I had to pacify him to keep him from crying so hard. He said he didn't want to make the will in the first place. He said they made him do it, or rather forced him to do it."

Now, either the old gentleman was incompetent to know what he was talking about at the time he made these statements or, as a matter of fact, he never made them at all. The testimony all shows conclusively that the last will was made in October, 1910. That he knew just where it was and all about it. That it was made before B. B. Richards, when none of his relatives were present. And it is absurd to say that the old gentleman at that time told Mrs. Crab that he never wanted to make that will and that the boys forced him to do it. It is also unreasonable and absurd to think the old gentleman would keep the will in the house unopened for several days, as testified to by Mrs. Crab, and be crying continuously about its contents, both before and after it was opened and destroyed, according to her testimony.

Another point of difference between Jerusha Crab and her daughter is, while the language is iden-

tical, they have different dates upon which Marvel and his father had the first conversation after Marvel's arrival there on the 3rd of April. Take the testimony of Jerusha Crab (Page 101):

Q. Did you hear any talk between him and Marvel about that?

A. Yes, I heard what he said **in the evening.**

Q. What did he say?

A. He says, Marvel, if you have come after me to take me down to make any papers, I won't go ary step.

And on page 102:

Q. Now what did Marvel say when he told him that?

A. Why, he says, Father, we have no such intention as that. He says, it shall be divided equal, he says, I won't influence you to sign anything, or words to that effect.

It will be remembered that this conversation, according to her testimony, **took place on the evening** that Marvel arrived there to bring the old gentleman home, and at a time, too, the Court will remember, when the witness Crab has testified on two different occasions that the old gentleman was not competent to do any intelligent business.

Mrs. Wheeler testifies on pages 70 and 71 that this conversation took place between Marvel and his

father on the **next morning** after Marvel came there, and we note the significant and suspicious line of testimony where both Mrs. Crab and her daughter were always conveniently just outside, where they could hear everything, and how they listened to the different conversations about the property, can remember no other part of the conversation, cannot even give another word except practically in the identical language to reiterate what was said respecting the property, and yet they have never never talked it over between themselves. I suppose, though, if they could hear at all, one would hear the same words if listening in the kitchen that the other would hear if listening in the parlor,—yet these people "Had no particular interest in the property," had never in any manner said anything to the old gentleman about how it should be disposed of.

On page 111 Mrs. Crab testifies:

Q. You didn't pay any attention to what he was saying about his property?

A. Not very much, just paid attention enough to show respect and listen to him, I could hear him all over the house—be kind to him.

The witness, however, according to her own testimony (though in substance contradicted by her daughter) was interested enough to stand back of him and read the will, every word in it, written, as she says, in large print, and to endeavor to establish the fact that Homer Watts had made the will and

that she saw his name signed to it, doubtless for the purpose of making it appear that Homer Watts was the instigator of that will.

On page 109 Mrs. Crab, testifying with regard to what transpired on the morning of the 18th, the next morning after Mr. Watts' arrival there, testifies, in substance, that she did not think Marvel had got to town yet when Mr. Watts commenced to talk about his will.

Q. Now, was that the first thing that was said between you at the time about his property?

A. Yes, I didn't know he had a will. He said, Jerusha, I've got a will and I want you to send and get it, write and get it for me.

There is a positive declaration of the witness that that was her first knowledge that the old gentleman had a will, which dóes not compare favorably with her statement, made on page 126 of cross examination, in which she says "Marvel told me that there was a will, the first I ever heard of it. If you want me to tell that story, why, I can.

And the witness proceeds to detail how upon the arrival of Marvel there the first evening he "winked" or "nodded" or did something to attract her attention, called her out behind the house and requested her to get the will and destroy it, to keep Homer from getting any of the property.

Marvel further said, "Well, Homer has never treated father right and I don't want him to have any of the pproperty. You should have your share. I feel that you should have your share. I would like you to get it and have him make another will. I said to him, It is not right, Homer is our brother and father's son, and I believe Homer is a good boy, and I want to see him have just as much as I have or as you have. He is as much entitled to it as you or I." (Page 139, Transcript of Record).

Just for a moment consider the unreasonableness of the plaintiff's situation. If Marvel Watts knew of this will and knew it was in the bank right in his home town, where he was a director or officer, perhaps, of the bank, why should he request his sister, way up there, to write down and try and get hold of this will and destroy it, and what interest would Marvel have, if he knew the contents of the will, in having her get it and destroy it, and give her the share of property that Homer might get, or possibly leave him out altogether? The reasoning is absurd. And compare this modest request with the testimony of Jerusha Crab given on page 103 and 104, Transcript of Testimony (133 of Record), referring to the time they were out to the train as Marvel was bringing his father home:

Q. Now, did you have any talk with your brother Marvel there at the train?

A. Yes, sir.

Q. In relation to the property in any way?

A. Yes, sir.

Q. How did that occur and just what was said?

A. He came up to me and he says "Now Jerusha, don't worry any thing about the property, there has been family trouble enough and we will divide it equally and have peace now.

What family trouble had there been? Why should Marvel be making any such remark as this? There had apparently been no controversy, no family trouble over the property. According to Jerusha's testimony she had not been worrying anything about the property, apparently, and there is nothing watever to call forth any such remark. The serious condition of the old gentleman was not brought to mind. Jerusha would have the old gentleman the morning that he left, at a time when she herself testified he was incompetent to do anything, calling the family in one at a time and repeating, "On my word of honor I want Jerusha to have her one-third of the property, and I want it divided equal." There had been no controversy, nothing to call forth any such remarks. The witness had Marvel Watts calling her off around the house to get her to destroy a will in which he is one of the chief beneficiaries, insisting that Homer be cut out of the will, and then she has Marvel Watts calling her off down beside the train to tell her that he will see that the property is divided equally.

If this case were reversed and suit were brought against Jerusha Crab and her daughter for influencing the old gentleman in the destruction of his will, and the case were being considered from that point, it seems to me there would be no escape from a conclusion of guilt. A casual reading of the testimony of Jerusha Crab and her daughter sounds fairly well, but in a close inspection it is most convincing that they are not telling the truth in many important respects, prompted possibly by chagrin and disappointment growing out of the, to them, unsatisfactory results of the former case outlined at page 263 et seq. Transcript of Record.

Inasmuch as the opinion of the Hon. District Judge appears to have been grounded upon the cases of Allore vs. Jewell, 94 U. S., 506, 24 L. E., 260, and Jenkins vs. Jenkins, 66 Or., 12-17 (Transcript of Record, page 90), we desire briefly to discuss the application of these cases to the case on trial. We have heretofore shown that the rule as to Burden of Proof laid down by the Supreme Court of the State of Oregon in Jenkins vs. Jenkins supra, does not prevail in the Federal Courts, by the latest expression of the Courts upon the subject.

> Towson vs. Moore, 173 U. S., Page 17-22, 43 L. E., 593.

Considering then the case of Allore vs. Jewell, supra, it is noticeable that the grantor for a long series of years had been and was bordering on insanity; her physician testified that for many years he had considered her partially insane and that in his opinion she was not competent to understand a document like the one executed. This condition was corroborated by a large number of witnesses. The grantee had been informed by her physician that she was "Not in a condition to make any sale of her property in a right way." No single witness could or did say that she was insane, or wholly incompetent to transact any business, but all agreed that her mind was so weak as to render any important business transaction with her of doubtful propriety. Notwithstanding this condition, which was well known to the purchaser, he, the purchaser, went with his agent and his attorney to her alone in her hovel and obtained the deed for a **consideration,** but for a wholly **inadequate** consideration.

In the cause on trial here all of the witnesses, his family physician, his intimate friend David Taylor, his nurse Mrs. Carden, and numerous other persons who saw the old gentleman at the drug store, all disinterested persons, testify to the clearness of his mind on the day the deeds were executed. Even if the statements attributed to him by the testimony of the Crabs, made on the morning he left Jerusha's house, be true, they show a clear condition of the mind at that time. **Here the grantees were his oft-**

time expressed favorites, worthy of his gratitude. And again, evidence is entirely lacking that Homer Watts is in the slightest degree a beneficiary under the deeds or that he was in any way acting for the grantees. He was an Attorney in good standing, one whom his father had confidence in as an attorney, and acted wholly as the adviser and Attorney and under the direction of his father at the time the deeds were made, and without any knowledge on the part of any of the beneficiaries that he was so doing. A case wholly different in all its material facts from the case of Allore vs. Jewell, except in the one particular, that both grantors were weak in body and died shortly after the deeds were made.

Owing to the advanced age and feeble physical condition of Mr. Watts at the time he executed these last deeds, we concede that the case is one that requires a full explanation of his acts in executing the deeds, and one that requires a showing as to his mental condition, but we believe that the requirements of the case have been fully met by testimony of witnesses and by the previous acts and declarations of the old gentleman, made at times when there could be no question of his sound mentality, and thus believing, we submit the case to the Court in full confidence that the deeds will be sustained and that the Court in so doing will have fully carried out the final

wishes and determinations of Mr. Watts with respect to the disposition of his property.

Very respectfully submitted,

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AND
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No. 3207

IN THE

United States Circuit Court of Appeals

for the Ninth Circuit

JERUSHA CRABB and JOHN CRABB, husband and wife,

Plaintiff and Respondents

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS and VERNITA WATTS,

Defendants and Appellants.

Brief of Respondent

Appeal from the District Court of the United States for the District of Oregon

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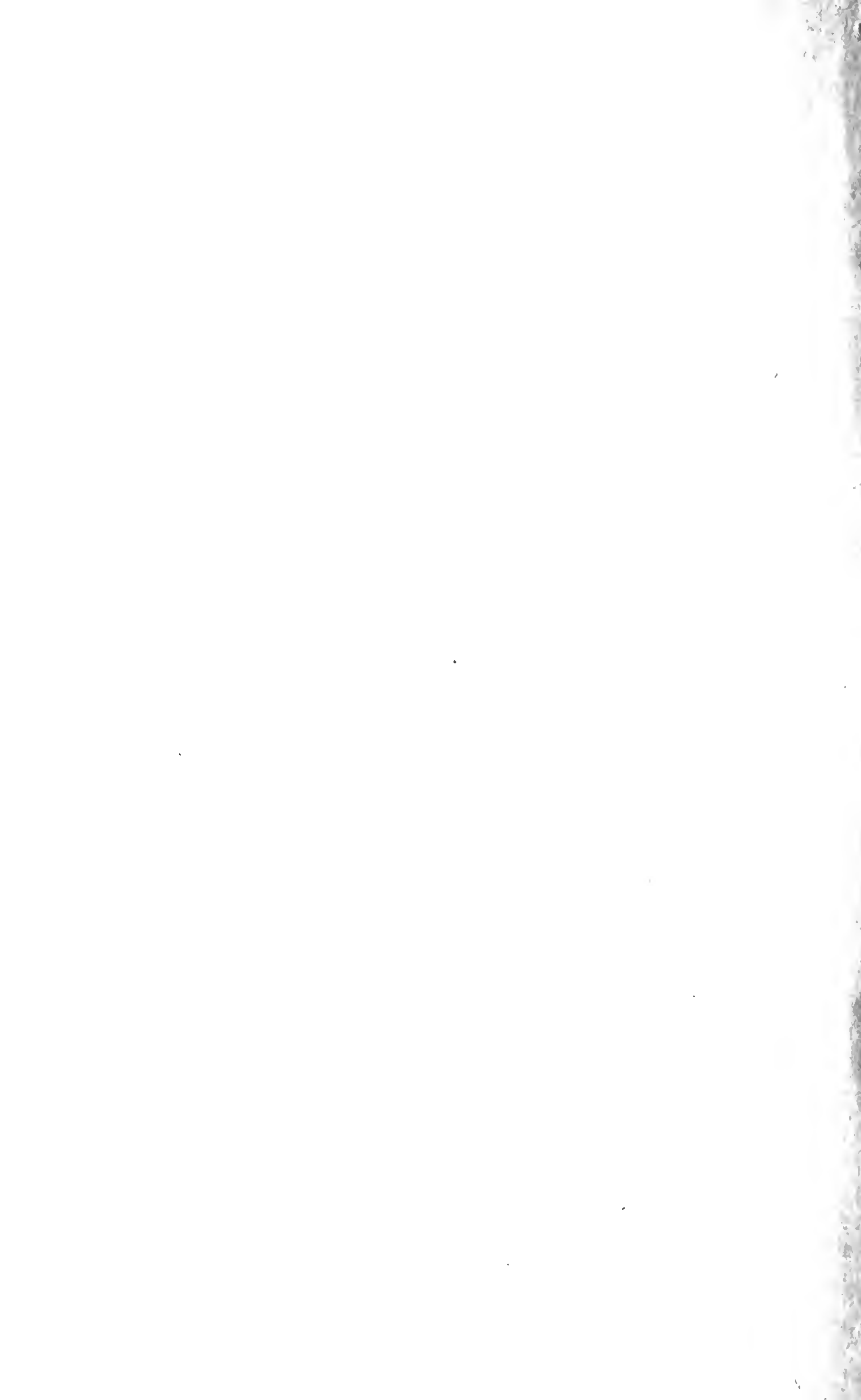

CRABB VS. WATTS

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IN THE

United States Circuit Court of Appeals

for the Ninth Circuit

JERUSHA CRABB and JOHN CRABB, husband and wife,

Plaintiff and Respondents

vs.

HOMER I. WATTS, MARVEL WATTS, JENNIE ANDERSON WATTS and VERNITA WATTS,

Defendants and Appellants.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFFS.

This is a suit brought by the Plaintiffs and Respondents against the Defendants and Appellants to set aside certain alleged deeds, purporting to have been made and executed by one THOMAS J. WATTS during his lifetime.

The plaintiff JERUSHA CRABB, and the defendants HOMER WATTS and MARVEL WATTS are half-sister and brothers. The defendant JENNIE ANDERSON WATTS is the wife of the defendant MARVEL WATTS, and the defendant VERNITA WATTS is his daughter.

The suit is brought on behalf of the plaintiffs to set aside and cancel the deeds in question.

At the time of the execution of the deeds in question, THOMAS J. WATTS, the deceased, and who was the father of the plaintiff JERUSHA CRABB and HOMER and MARVEL WATTS, was a very old and feeble man, somewhere between eight-two and eighty-five years of age.

The deeds were made when he was sick at the home of the defendant HOMER WATTS. For some years prior to his death, and the execution of the deeds, he had been feeble and childish, but, ordinarily, in the exercise of such faculties as would naturally be left to a man of his age. About seventeen days before his death, however, and about two weeks before the alleged execution of the deeds in question, he had a very severe attack rendering him partly, and at times wholly, unconscious, and from which he never fully rallied. After that attack he was never out of bed but two or three times, and then it was necessary to carry him from the bed to his destination. The deeds are alleged to have been executed on the fourteenth day of April and he died on the 20th day of the same month.

At the time the deeds are claimed to have been executed, the deceased was entirely dependent upon Marvel Watts and Homer Watts for care and attendance.

He was at Homer Watt's house and he could not feed himself, or get out of bed, or perform any of the most simple functions of life, without their help and assistance.

At the very time the deeds are claimed to have been executed there was no one present, except Homer Watts and a witness to the deeds procured by him, by the name of Guy Jonas, a saloon-keeper in the town of Athena, who was under very great obligations to and in close relations with Homer Watts, by whom his attendance as a witness was secured.

Previous to the alleged execution of the deeds on the 14th of April, and at that time, the doctors attending Mr. Watts had been and were administering strychnine in tonic doses as a heart stimulant. The effect of this stimulant was to make the deceased somewhat brighter in the exercise of his faculties than he would be at other times. The extent of this brighter condition and its continuance would depend upon the kind of a dose taken. On the day in question when the deeds purport to have been executed, the defendant, Homer Watts took the deceased in an automobile out for a ride, and took him down town and caused him to meet a considerable number of old acquantances, who came to the automobile and talked to him about simple matters, as to the way he was feeling, etc. *He was taken out on this*

ride against his wishes and *against the advice of the physician* who was in charge. They had to carry him from the bed to the automobile, and again from the automobile back to the bed. According to the testimony of the nurse, who was a witness for the defendants, this was the only time the deceased was out of his bed, during the time he was at Homer Watts' house. Whether a dose of the tonic medicine had been administered to the deceased before this trip, and if so, the extent of that dose, does not appear in evidence.

The ostensible purpose of the trip, as testified by Homer Watts, was for the purpose of taking him to Homer Watts' office and there executing the deeds in question. But, as a matter of fact *they did not go to the office at all*, Homer Watts claiming that they changed their minds for some reason, and he finally brought his father back to the house and had the deeds executed there.

Before the deeds were executed Mrs. Homer Watts, *took the nurse out for an auto ride and took her away from the house*, leaving no one there at the time the deeds are claimed to have been executed but Homer Watts himself and Guy Jonas, his saloon-keeper friend and protege.

The deeds were executed *with great secrecy*. Neither the nurse, who attended him constantly, (with the exception of the time she was out on this automobile ride), nor the doctor who visited him every day, nor any one of his old friends or neighbors who occasionally called

in, *had any knowledge that any such deeds had been executed* or that there had been any talk about property affairs while he was sick.

Naturally, under such conditions of secrecy, the direct testimony as to what transpired at the time of the alleged execution of the deeds is confined to that of Homer Watts himself, and the saloon-keeper Jonas. And the defendant Homer Watts is the only person who claims to have any knowledge of the talk that preceded the execution of the deeds.

Homer Watts was himself a lawyer and had had a good deal of experience in contests over the disposition of old people's estate. He was one of the attorneys in the famous Mable Warner will case and at the very time these deeds were drawn *he had a will contest pending where the Government was trying to set aside an Indian conveyance by which the entire property amounting to $12,000 or $15,000, belonging to an Indian on the reservation, purported to have been conveyed to him*, and the Government was trying to set it aside on the ground of fraud and undue influence.

The deeds in question purported to give practically all the property belonging to the deceased, amounting to between $35,000, and $50,000, to the wife and daughter of Marvel Watts. But the relations between Marvel Watts and Homer, his brother, were such that the matter of adjustment between themselves was an easy one, and impossible to be traced. They were, at the time, farming together about a thousand acres of wheat

land. They were the owners of land together, near Athena, and, about that time they bought, estensibly together, 800 acres of land in Montana.

Of course, it would have been impossible for Homer Watts to have made the deeds from his father run to himself directly, without calling in a responsible outside Notary, who would necessarily have known something of the condition of the old gentleman and of the circumstances, arguments, and inducements under which the deeds were executed, if executed at all.

Homer Watts claims to have been left out by the deeds and to have been angry and bitter over the fact, and both he and Marvel overlooked no occasion to ostentatiously parade this supposed bitterness. But at the same time, the actions of both of them are inconsistent with this claim, and show that they were working all the time, harmoniously together.

Marvel Watts claims that after the deeds were delivered to him he gave them back to Homer to attend to having them recorded, and Homer claims that he agreed to do so and would have done so, but for an oversight.

Homer and Marvel join in the administration of the estate, the one as attorney and the other as administrator. Together they sold an eighty of land which was free from mortgage, and which would have been inherited by all of the children together, and used the money to satisfy the mortgage on the property conveyed

to Vernita Watts, and although Legrow, the cashier of the bank, was the ostensible purchaser of this eighty, these two defendants are still farming it together. When it came to the settling of the fees for the administering of the estate they divide the balance which was left over after paying the debts, equally between them, and during all the trial of this case, the defendant Homer Watts has been at least equally active with the defendant Marvel Watts and still is equally active, in the attempt to support and uphold these conveyances.

At the time of the alleged execution of these deeds, the plaintiff Jerusha Watts, the other child of the deceased, and the half-sister of these defendants had no knowledge of the transaction, nor was she informed of it by the defendants in any way at or about the time.

She came down to the funeral of her father, and the estate and the administration of it were the subjects of discussion, but not a word was said to her or to her husband about these deeds.

Mr Watts *died at eight o'clock on the 20th of April, and at 11:25 of that same day the deeds were offered for record.* The defendants undertake to explain this failure to record the deeds, during the lifetime of the deceased, and the haste to record them immediately after his death, by a series of remarkable oversights and coincidences, and claim that they were finally left with the bank to be sent down and recorded on Saturday morning before their father died. But we shall show in the course of the argument, we think from the circumstances

that this explanation is not only far-fetched and unnatural, but that it falls entirely to the ground, and that the evidence shows conclusively that these deeds were not sent by the bank through the mail, as claimed, but that they were taken down and offered for record personally at 11:20 or 11:25 on the day of the old gentleman's death.

The defendants now claim that Marvel Watts *knew* of these deeds and that they were delivered to him *on the day after they were executed,* but shortly after the death of Mr. Watts, they made a different claim.

According to the testimony of three witnesses, they then claimed that he never knew anything about the deeds *until after the death of his father.*

At the time of the death of deceased the plaintiffs and the defendants were all fairly well-to-do people, but it is obvious from the evidence that Marvel Watts and his family were far richer than any of the other children. According to the evidence Marvel Watts was possessed of at least $40,000 or $50,000 in his own right and his wife, Jennie Anderson Watts, was worth some $12,000 or $15,000 independently of the wealth of her husband. Vernita Watts was their only child, and in the course of nature, would have inherited the wealth of both of her parents. Mrs. Crabb and her husband owned together property in the value of about $32,000, and had five children, all of whom were poor.

When plaintiff, Jerusha Crabb, was about six years

old her father married a second wife. She was then turned over to an uncle who raised her and from whom she finally inherited about $9,000. This is offered as a reason why she should not receive anything from her father's estate. But Mrs. Marvel Watts, to whom was deeded nearly one-half of the deceased's property, had inherited a much larger sum from outside sources, and Marvel Watts and Homer Watts had inherited almost equal sums from their mother's share of their father's estate.

After the re-marriage of the old gentleman he and the plaintiff Jerusha Crabb were not very much together while he continued to live with his second wife, but after his divorce from her some four or five years before his death his relations towards his daughter grew steadily closer and more intimate, and overwhelming evidence shows that during the last two or three years of his life their relations were very close and intimate and he was with her a great deal of the time, and manifested for her the most tender regard and solicitude. She nursed him through one sickness about two years prior to his death and had nursed him partly through his last sickness at the time he was taken away against his will, by the defendants Marvel and Homer Watts.

During the fall and winter before his death he was growing rapidly more feeble all the time. He went to California in the fall of 1913, hoping that the trip would benefit his health.

On the 28th of February the children got word that he was worse and that it would be necessary for somebody to come down and bring him back. Marvel Watts went down and brought him home. He was then able to walk around with assistance and had fairly good possession of his faculties. He stayed with the boys for a few days or a week and then insisted on going up to visit Jerusha. Marvel took him up there and left him there on the 17th day of March and he remained until the 11th of April, when, as we have already said Marvel came and took him away.

The evidence, we think, is overwhelming that during the last year or two of his life and during this visit from the 17th of March to the 11th of April at Jerusha's he fully intended that she should have her share of the property with the boys.

Five witnesses, two of them entirely disinterested, testified to his repeated statements to that effect., and there is absolutely no conflicting evidence.

It is admitted that when Marvel came after him he did not want to go, but wanted to stay with Jerusha, and Mrs. Crabb did not want him taken away, both of them thinking that he was not able to go, but although the trip was a long and hard one, and he was so sick and feeble that he had to be carried to the automobile and to the train—Marvel insisted on taking him, making some claim that he was not being properly taken care of. He took him to Homer Watts' house and left him

and in less than three days from the time that he had been so freely expressing himself as wishing and intending that Jerusha should have her third, it is the contention of the defendants that he made these deeds, by which instead of giving her a third he left her out entirely, disenherited all of his children, and gave the entire property, partly to one who was not of his blood at all, and partly to a grand-daughter who was already richly and amply provided for.

EQUITABLE PRINCIPLES UPON WHICH THE PLAINTIFF RELIES IN THE CASE.

"It is not necessary in order to procure the aid of equity to prove that the deceased was, at the time, insane, or in such a state of mental imbecility as to render him entirely incapable of executing a valid deed. It is sufficient to show that from his sickness and infirmities he was at the time in a condition of great mental weakness and that there was gross inadequacy of consideration for the conveyance. From these circumstances imposition or undue influence will be inferred."

Allore vs. Jewel, 94 U. S. 506, 24 Law Edition p. 261.

"If it is shown that the donor and donee were in confidential relationships to each other then a weak-

ness of mind, even though not to the extent of producing mental unsoundness may operate to overturn the gift, especially if it is a large one in value consisting of nearly all of the donor's estate."

Thornton on Gifts and Advancements, p. 443, Sec. 442.
Harding vs. Wheaton second Mason 378-, 11 Fed. cases, p. 495, Id. 11 Wheaton U. S. 103.
Hensan vs. Cooksey, 237 Ill. 620—86 N. E. 1107.
Jenkins vs. Jenkins, 66 Ore. 17.

"A gift obtained by any person standing in a confiential relation to the donor is always subject to grave suspicion.

Jenkins vs. Jenkins, 66 Ore. 17,
Clough vs. Dalton, 69 Ore. 60.

"The relation between parent and child is fiduciary and confidential and this is especially true where the parent is old and feeble and entirely dependent upon the child for care and attendance.

Hensan vs. Cooksey, 237 Ill.620—86 N. E. 1107.

"The dependent condition and the confidential relation may with other circumstances create a presumption of influence.

Hensan vs. Cooksey, 237 Ill. 620.

"Evidence of direct influence used at the time the gift is made is not required. It is very often difficult

to show by direct proof the undue influence, and direct evidence of the actual exercise of such influence is not expected. Oftentimes the means of keeping the influence out of sight are many and easy of application and yet the result may be clearly seen. The fact of the influence exerted is very often gathered from the circumstances attending the donor. His health, age and mental condition,—how far he was dependent upon and subject to the control of the person benefited, the opportunity which the donee had to exercise his influence, and the disposition of the donor to be subjected to it."

> Thorton on Gifts and Advancements p. 449. sec. 454.
> Rood on Wills, Sec 190 p. 117-118;
> Alexander on Wills, Vol. 2, Sec 604, p. 911;
> Thompson on Wills, Sec. 86, p. 80.

Either incapacity or undue influence may be sufficient alone to set aside a deed. But frequently they both occur together and when they do each has its bearing on the other. Where a person is mentally weak less influence may be undue and vica versa.

> Harding vs. Wheaton, 11 Fed. Cases 495—Second Mason 378;
> Rood on Wills, Sec. 175 p .106.

"The age of the donor is always a matter for consideration. An old, feeble man is not always as able to resist the importunities of those near him, especially when his mind is weakened by disease, as a man in the

full vigor of life. What might be a valid gift in the latter instance might very probably be void in the former. If a person, whose mind is enfeebled by disease or old age, and who is so placed as to be subjected to the influence of another person the gift is presumptively void."

Thornton on Gifts and Advancements p. 444, Sec. 444.
Thompson on Wills Sec 84, p. 79.

The court will consider the confidential relation of the parties—the previous declarations of the deceased—the secrecy of the transaction—any extraordinary or unusual proceedings in relation thereto—the dependency of one party on the other—the character of the transaction, as depriving the grantor of his property during his life time, etc.

Wolf vs. Harries, 57 Ore. 279;
Thompson on Wills, Sec 86, p. 80;
Alexander on Wills, Vol. 2, Sec. 604.

"Secrecy is itself a badge of fraud"

Wolf vs. Harris, 57 Ore. 279.

"So is undue haste in the time that it was recorded after the maker's death." ·

Wolf vs. Harris, 57 Ore. 279.

"The absence of the other members of the family and of independent advice is a strong circumstance."

Hensan vs. Cooksey, 237 Ill. 620. 86 N. E. 1107.

"So, too, the amount of the donor's property remaining after he has made a gift is for consideration unless it (the gift) is trifling in value. The donor *will usually not strip himself of property for the benefit of the donee* and run the risk of poverty or want. *The amount of the gift, other things being equal is often the turning point in its validity.*"

Thornton on Gifts and Advancements, p. 449 Sec. 454.

"If the mind of the donor was brought to a purpose preconceived by the donee for his own advantage, by an influence the donor could not escape, under the circumstances in which he was placed, and which was deliberately used to affect such purpose, then that influence, or its exercise was undue and improper."

Thornton on Gifts and Advancements, p. 443. Sec. 441;
Alexander on Wills, Vol. 2, Sec. 573, p. 867.

"A deed like this must be sustained as a gift *inter vivos* if it is sustained at all and must have absolutely passed the property during the life of the grantor and without regard to his possible recovery for 'a gift of real estate cannot be sustained as a *donatio motis causa* for that only extends to the person and a deed intended as such a gift is void.'"

Thornton on Gifts and Advancements p. 373, Sec. 370;
Alexander on Wills, Sec. 203, p. 234-5.

It is not necessary that the grantees should themselves have exercised the undue influence. The fact that they are, themselves, seeking to take the benefit of deeds so obtained is sufficient and places them in exactly the same position as though they had used the influence themselves, where, as in this case, there was no valuable consideration.

> Clough vs. Dalton, 69 Ore. 61;
> Winy vs. Haverlich, 161 S. W. 732 Sec. 253 Mo 502.

UNDUE INFLUENCE—FRAUD NOT NECESSARY:

"Undue influence may be exercised without actual fraud or false representations made to the testator. Any fear, or desire for peace, or flattery, or over-persuasion, may amount to undue influence."

> Thompson on Wills, Sec. 530, p. 466.;
> Alexander on Wills, Sec. 599, p. 906.

ARGUMENT

It hardly seems possible in this case to add anything in the way of argument to the statement of the facts themselves. The case seems to us to be bristling all over with badges of fraud and undue influence.

THE VERY TRANSACTION ITSELF UPON ITS FACE IS AN UNJUST AND UNREASONABLE ONE AND EXCEEDINGLY UNLIKELY IF THE OLD GENTLEMAN WAS IN FULL POSSESSION OF HIS FACULTIES.

As we have already seen the gift, if it was a valid gift at all was *inter vivos* and intended to pass the property absolutely from the old gentleman to his daughter-in-law and grandchild at the *time of the execution of the deeds* and would have practically stripped him of every thing he had except a life interest in the smaller of the properties deeded.

It is not the contention of the defendants that the deeds were mortis causa, and if such contention was made it could not prevail because a deed mortis causa would be an attempt to avoid the statute of wills, and would be void.

A gift mortis causa applies only to personalty, and such a valid gift cannot be made of real estate.

"A gift of real estate cannot be sustained as a donatio mortis causa for that only extends to the personalty, and a deed intended as such a gift is void." (Thornton on Gifts and Advancements, Page 373, Sec. 370.)

In the new and very able work of Mr. Alexander on the Law of Wills, it is said; "It is only personal property that may be the subject of a donatio mortis causa. It has been said that under the Roman law, real property as well as personal property could be the subject of such a gift. This rule has never prevailed in England or the United States.* * * * * * * * * * * * *

Judge Redfield, after quoting the definition given in the Institutes of Justinian of a donatio mortis causa, said that such a gift would not include real property even though conveyed by deed. He held that a deed of realty, although made in apprehension of death, was a testamentary disposition and void, saying—'A gift of real property cannot be sustained as a donatio mortis causa, but that extends to personalty.' This is the universal rule in England and America."

Alexander on Wills, Sec. 203, p. 234-5.

One of these deeds conveying the greater part of the property was absolute on its face, and the other one reserved only a life interest.

The old gentleman had none too much property to support himself as it was. The income from the entire property, according to the evidence, had been about $1,000.00 a year for several years past and he had been sick and ailing, and traveling from one place to another, and necessarily incurring large traveling expenses, doctor bills, etc. At any rate, the evidence shows that he had spent every dollar of his income from year to year from the whole property. The evidence also shows that he did not have a dollar of money in the bank at the time of his death. And yet, the contention upon the part of the defendants is and must be that this old gentleman, not having any more than enough to support him and not knowing how long he would live practically stripped himself of all of his available assets except the life interest in less than one-half of his property as he conveyed more than one-half absolutely in preasenti to his grandchild and conveyed the remainder to his daughter-in-law in such a way that he could not hypothecate it or make it available for his support in his sickness or health in case of necessity.

Even if he had been giving the property to his own children—closest to him in all the world by blood and affection—it would not have been a natural, let alone

a wise and reasonable thing for him to do to thus strip himself of the larger and more valuable part of his property.

It is a natural thing for a man to make a will and provide for the disposition of what property he has left after it ceases to be necessary for his own support, *but for a man who is old and sick, and must know that he will need attention and waiting on and care to strip himself of the greater part of his own property when it is all no more than sufficient for his support is not a natural or reasonable thing.*

Such a conveyance absolutely without valuable consideration, we submit, according to all the authorities, is upon its face always viewed by a court of equity with jealousy and distrust.

The character of the transaction, and its unnatural and improvident conditions are of themselves the strongest kind of circumstances against the deed, and tends strongly to suggest either mental unsoundness or undue influence, and strongly strengthen any other circumstances which throw distrust upon-the trans action.

THOMAS J. WATTS DEPENDENT UPON HIS SON.

This is a very important consideration. At the time of the alleged execution of the deeds the defendants.

Marvel Watts and Homer Watts had removed the deceased to Homer's home. He was sick and in bed, and according to all the testimony, unable to get up alonė, unable to feed himself, unable to dress himself, unable to attend to the simplest functions of life without their help. Under such conditions he was in no position to resist arguments to sway him, or importunities—in no position to exercise his own free and intelligent initiative.

That the relation between a parent and child where the parent is thus entirely dependent upon the child for care and attendance and for the supplying of his every immediate want is fiduciary and of the utmost importance in cases of this kind is recognized by all the authorities as *shown in* those already cited. In such a case it requires very little other proof that the deed was obtained by undue influence and is void

> Thornton on Gifts and Advancements, p. 443;
> Harding vs. Wheaton, 2 Mason 378, S. C. Fed. eral Case 495, I. D. 11 Wheaton U. S. 103;
> Hensan vs. Cooksey 237, Ill. 620-86 N. E. 1107,;
> Jenkins vs. Jenkins, 66 Ore. 17;
> Clough vs. Dalton 69 Ore. 60.

And this presumption cannot be overcome by the mere statement of the party exercising the influence that he did not bring any such influence to bear. If it could be so overcome then all that would be necessary in any case would be to involve the transaction in complete secrecy and keep every disinterested witness away,

as was done in this case, and the fraud could not be possibly traced or disclosed.

That he was in this helpless and dependent condition is overwhelmingly shown by the testimony.

Taylor testifies, "I never saw him try to walk except the one time after he came from Jerusha's. That was the day he had been for a ride. That time he kind of crawled around and I got hold of him and helped him a little," to the foot of the bed and back.

EVIDENCE OF TAYLOR

Printed Record p. 187

Again he testifies:

"Q. He couldn't walk then without somebody helping him?

A. I don't think so, I didn't see him try.

Q. He had grown more feeble when you saw him the last time?

A. Oh yes, feebler all the time.

Q. Yes, getting more feeble and lower all the time?

A. Yes, sir.

Printed Record p. 187-188.

Dr. Sharp testifies: "The first time I saw Watts after

he came back was April 12th—in the evening, he was *very feeble and weak and exhausted.* I did not talk to him very much he was so hard of hearing that I could not talk to him."

Printed Record p. 192.

Mrs. Carden the nurse, testifies that she went there Sunday morning about seven o'clock and stayed until he died.

Printed Record p. 223.

"Q. Were you with him all the time?
A. Yes, sir, I was.

Printed Record p. 223.

"Q. He was very old and feeble, wasn't he?
A. Yes, sir, he was.
Q. And childish, wasn't he?
A. Yes, sir."

Mrs. Carden, Printed Record p. 223-4.

She testified that she gave him a sponge bath in bed every day because he was unable to get up.

Printed Record p. 224.

Q. "Now the only time he was up in his chair while you was there was that day when he went out riding, and then he was up about twenty minutes, wasn't he?

A. Yes, sir, just put him in his chair.

Q. *That is the only time he was up in his chair while you were there?*

A. Yes.

Mrs. Carden, Printed Record p. 235-6.

Again, at another place she testifies:

Q. "*Now, with the exception of the time when he went out auto riding was he out of bed any time while you were there until he died?*

A. *No, sir.*

Q. *Never was?*

A. *No, he was not out.*

Q. *He never came to the table at any time, he wasn't able to?*

A. *No, not while I was there.*

Q. Not from Sunday morning until he died?

A. No.

Q. And on this day when he went out automobile riding did they take him out of bed?

A. Yes, sir.

Mrs. Carden, Printed Record p. 224.

At another place she testifies that he was so bad off she could not have put him to bed alone or got him from the dining room to the bed room alone.

Mrs. Carden, Printed Record p. 237.

All these witnesses were witnesses called by the defendants and their testimony as to his helpless and dependent condition is absolutely uncontradicted except

that Homer Watts himself disputes all these witnesses by saying that he was up in his chair and up to the table two or three times while he was there.

We agree that old age, or physical weakness, will not alone destroy the capacity to make a gift where the gift *is in accordance with the real wishes of the donor*, and where there is no undue influence, and his physical and mental condition and the circumstances are such as to permit independent action upon his own initiative.

On the other hand, it is not necessary to prove that the grantor was entirely imbecile at the time. Neither is it necessary to prove undue influence by direct evidence.

In Allore vs. Jewell 94 U. S. 506, 24 L. Ed. 261, which is a leading case, perhaps more often quoted and approved than any other opinion of a Court upon the subject, it is said:

"It is not necessary to prove that the deceased was at the time insane or in such a state of mental imbecility as to render him entirely incapable of executing a valid deed. It is sufficient to show that from sickness and infirmities, he was, at the time, in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred."

In Thornton on Gifts and Advancements, Section 454, it is said: "Evidence of direct influence used at the

time the gift is made is not required. It is very often difficult to show by direct proof the undue influence, and direct evidence of the actual exercise of such influence is not expected. Oftentimes the means of keeping the influence out of sight are many and easy of application, and yet the result may be clearly seen. The fact of the influence exerted is very often gathered from circumstances attending the donor; his health, age and mental condition, how far he was dependent upon and subject to the control of the person benefited; the opportunity which the donee had to exercise his influence, and the disposition of the donor to be subjected to it.

In Rood on Wills it is said:

> "The testator may be so feeble that a very little pressure will overcome his wish and substitute that of another. Merely talking to him may so fatigue him that he would do anything for the sake of peace and quiet. A will procured by such means is void because of the undue influence."

Section 175, Page 106.

In Alexander on Wills, already cited, it is said:

> "Undue influence need not be established by direct proof, but may be shown by facts from which it may be naturally inferred. From the very nature of things, it can rarely be proved by direct evidence. It is seldom exercised openly in the presence of others."

Here the consideration was not only "grossly inadequate", (no consideration at all) as stated in Allore vs. Jewell, but there are half a score of other facts and considerations, any one of which might be almost enough *alone*, to establish undue influence or mental incapacity. The nature of the transaction, practically beggaring the old gentleman during his lifetime, is, as we have seen, a very strong circumstances.

THE CLAIM THAT VERNITA WATTS AND MRS. WATTS, THE OSTENSIBLE GRANTEES IN THE DEEDS TOOK NO PART IN PROCURING THEIR EXECUTION.

The defendants make a strenuous claim based upon the lack of active participation in procuring the deeds by Mrs. Watts and Vernita and the supposed disinterestedness of Homer Wotts. But, as shown by the authorities we have already cited it is not necessary that the grantees themselves shall have been active parties to the procuring of the conveyances. It is enough where, as is the case with these deeds, the conveyances are without consideration that they are now standing behind the deeds and attempting to take advantage of them. If it were otherwise such frauds could always be consummated through the intervention of a supposedly disinterested third party.

Winy vs. Haverlinch, 253 Mo. 502 S. C. 161 S. W. 132;

Clough vs. Dalton, 69 Ore. 61.

As to the disinterestedness of Homer Watts who shall say that he does not receive the full benefit of these deeds.

For all practical purposes the deeds might as well have been drawn directly to Marvel Watts. He and his wife were getting well along in years. They had only the one child. She was an invalid. If she outlived him, as seemed improbable, she would, in the course of nature have inherited all his property. If he outlived her as was more probable, he would inherit it.

In the meantime he had the entire control and manaagement of it as is apparent from the evidenceand could no doubt secure deeds from his wife and daughter whenever desirable. It was all in his immediate family and subject to his control.

Marvel and Homer were partners, interested together in business in a half a score of different ways. They were partners in land around Athena. They were partners in farming large tracts of still other land. Just about the time of this transaction, according to the testimony, they bought together eight hundred acres of land in Montana.

Testimony of Homer Watts, Printed Record p. 174.

Under these conditions the matter of this inheritance could be readily and easily adjusted between the brothers. Not only this but it would be utterly impossible for any outsider to trace their secret arrangement or to disclose their true relations.

They are not only brothers and partners but they are evidently the very closest of friends. *In every step in this transaction they have been acting together, consulting together.*

Marvel Watts goes up to visit his father on the third of April. He hears that the will giving the property to him and Homer had been destroyed.

He admits that he came down and reported to his brother Homer, but he does not remember whether or not he told him that he had heard the will had been destroyed. He gets back home on the evening of the sixth. This consultation between the two brothers must have been between the sixth and the tenth, and on the evening of the tenth he is back at St. John with a plan arranged between him and his brother to remove his father from his sick bed, carry him to the train and by train to Athena, 140 miles away, where he places him under the charge of this very brother, that two days afterwards draws the deeds in question.

He had been told by Dr. McIntyre that his father would not probably recover. *Why this sudden solicitude to remove his father from his dying bed* and take him on this long trip in a baggage car to Athena and put him under his brother's care.

He tries to make the claim that this was because of unsanitary conditions and that his father was being poorly taken care of, but he seems to *have never had any solicitude on this ground until he learned that his father's will had been destroyed.* He took his father up there on the seventeenth of March and stayed all night himself. He must have known the conditions that were surrounding the Crabbs at that time, what kind of a house they had, whether or not they were cleanly people, and yet he seems to have been entirely satisfied to leave his father there for more than three weeks although he knew that he was sick and was notified constantly every day of his condition. Yet he never manifests the slightest concern as to his care or condition until he learns the will is destroyed.

Is it not obvious that this claim is a mere pretext and that it is intended as some sort of an explanation and excuse for his otherwise callous conduct, in being willing to disturb his father's last sickness, and take the risk of shortening the few days that he had left, by taking him, in his helpless condition, out of his bed and over the hard trip to Athena.

The old gentleman was evidently satisfied with his condition at the Crabb's. He did not want to go. The Crabbs did not want him taken away, but Marvel said: "*He had come for him and he was going to take him.*"

Testimony of Parker, Printed Record p. 111

The care that was taken of the old gentleman while

at the Crabbs was the best that could be had short of the conveniences of a hospital and a trained nurse. Nobody noticed anything wrong with it except Marvel and Homer and they *were looking for something wrong.*

Parker testifies:

"Q. Did you notice anything that was wrong about the bed in any way?

A. No, sir, I did not, I didn't."

Printed Record p. 114.

But Marvel Watts claims there was something wrong and said, "He stinks."

"I did not notice anything of the kind, I was not there to look for anything of the kind."

Parker, Printed Record p. 115.

Q. You did not notice anything of the kind?

A. No, I did not.

Parker, Printed Record p. 115.

Dr. McIntyre testifies:

"He was getting about the usual care at a ranch house. They have a good comfortable place there—and he had a good comfortable room such as you will find in a ranch house,— a bed about such as you will find there."

Dr. McIntyre, p. 24 Printed Record p. 116.

"Well it, (the bed) was fairly clean. Of course a

man in the condition that he was in, if there was any of the urine,—that is the water in the room, it would have a rather marked odor, because a man of his age usually has—he had a lack of control of the urine.

Dr. McIntyre, p. 25 and Printed Record p. 116.

Viola Wheeler, the old gentleman's grandaughter testifies:

"He had a good room,—he objected to sleeping on sheets, but the blanket under him was changed every day—he had as comfortable a bed as I ever slept on."

Viola Wheeler, p. 64 and Printed Record p. 124.

John Crabb testified:

"He was taken care of in the very best way he could be out on a farm—I don't claim to be a nurse, but I have had the care of a good many old people. I had as good a house as there was in the community. Carpets on the floors and electric lights. There was a Brussels carpet in the room where he slept. It was the one occupied by myself and wife when he was not there. The bed was a good one, was kept clean and changed regularly every day. He had trouble about his urine—could not hold it."

(John Crabb, p. 160-161) Printed Record p.144

And Mrs. Crabb herself testified:

"We took good care of him and kept his bed nice and clean."

P. 104-5-6-

"Every day I put clean blankets under him and changed them every day—white woolen blankets, and washed them every day, and the one over him of course I did not change so often. It was a new one. They had never been used by any one else until he came. He could not help but soil the bed from the time that he took sick, and I had to change it and change his underclothes."

Mrs. Crabb p. 105 Printed Record p. 134.

Of course, he did not have a trained nurse, but Mrs. Crabb offered to get a trained nurse and Marvel objected. (Mrs. Crabb so testified P. 106 and Marvel does not deny this or dispute it in any way)

Printed Record p. 134.

"I gave him a sponge bath every day, bathed his limbs and rubbed them with alcohol sometimes two or three times a day."

Mrs. Crabb p. 125., Printed Record p. 137.

It must be remembered that Marvel and Homer did not provide a trained nurse for the old gentleman when they got him down to Homer's house. On the other hand, they turned him over entirely to the care of a woman who did not claim to be a trained nurse but was a common working woman, knowing no more about taking care of the sick than did Mrs. Crabb or John Crabb her husband.

Testimony of Mrs. Carden. Printed Record p.234

We submit to the court, again that this claim that the old gentleman was not being properly taken care of was a mere pretext to explain the sudden solicitude to get him away from the Crabbs and down where he would be under the undisturbed influence of Homer Watts—the lawyer of the family, and who was, as we shall presently see, peculiarly experienced in the matter of obtaining a favorable disposition of old people's estates.

The testimony that the old gentleman did not want to go, did not think that he was able to make the trip and that the Crabbs did not want him taken away and did not think he was able to go cannot be gainsaid. Mrs. and Mr. Crabb and their daughter so testify, Mr. Parker so testifies and even Marvel Watts himself reluctantly admits that the old gentleman did not want to go and that Mrs. Crabb did not want him to take him *at first*.

Testimony of Marvel Watts, Printed Record p. 205.

And so, Marvel Watts takes advantage of the unfortunate condition of the old gentleman by reason of which he could not retain his urine and on account of which there was necessarily the odor about him that would be about any old man in such condition, however often he might be bathed and however carefully he might be attended, and offers this as a reason for his unreasonable insistance to take him away, instead of the real reason which we submit obviously was to get him down where Homer could have a better opportunity to work upon him, and secure some disposition of the property by which Jerusha should be left out.

We submit to the court further that the care taken of him by Mrs. Crabb and her husband and daughter will bear the most favorable comparison with the callous conduct of the defendants in relation to their father. With her the old gentleman had the care and affection of a loving daughter and of her children, his grandchildren, and her husband who seems to have been a man of the finest feelings in relation to such matters.

Mrs. Crabb attended to his every want in the day time, with the assistance of her daughter,—bathed him and took care of him, and nursed him with the loving hand of an affectionate daughter. while at night they gave up to him their own room and their own comfortable bed, and John Crabb slept in the room with him, and took care of him during the hours of darkness.

On the other hand, Marvel Watts took him out of his comfortable bed and away from the care of his daughter, —*took him in a baggage car* 140 miles to Athena, hauled him up to Homer's house *in a dray* and left him there, and from that time on never slept a single night in the house unless it was after the old man became delirious and could not be sufficiently attended to by a hired nurse. Mrs. Homer Watts seems to have paid no attention to him whatever. Mrs. Marvel Watts and her daughter, who were to be the nominal recipients of his bounty, acording to the plans of these defendants, paid him a perfunctory visit once a day.

They turned him over to a hired nurse, a common working woman with no special training in nursing. According to the testimony Homer Watts never slept in the room where his father was after the nurse came there on Sunday. Against the wishes of his father and against the advise of the physician in charge he *took his father out and exhibited him* on the day that the deeds were drawn and then brought him back, and left him in his dying bed, while he, according to his own testimony, went down to Pendleton *to attend a dance.*

No wonder that the old gentleman who had had a chance in the last few years of his life to measure and compare the relative feeling of his children towards him—hastened up to Jerusha's after a short visit at Athena when Marvel brought him back from California.

No wonder that he wanted to stay at Jerusha's when Marvel came up there after he had been there nearly three weeks and insisted on taking him back.

It is true that Marvel Watts offered still another reason for taking his father away, in his sick and feeble condition, and making him incur the risk of the hard, long trip from St. Johns to Athena.

He claims that John Crabb, at the time he was up there on the third of April made some hard hearted remarks to the effect that the whole family seemed to be dumping their dying relatives upon him.

John Crabb indignantly denies this, as do also Mrs. Crabb and Viola Wheeler.

The whole thing is unnatural as related by Marvel Watts.

If John Crabb had said anything of that kind about his father would not Marvel have spoken of it *then* and said: "If you feel that way about it we will take him away?"

Again, he admits that Mrs. Crabb *objected to his taking him away*, when he did take him away, on the 11th of April, and he told old man Parker that "*they* did not want him to take him but that he come for him and was going to take him."

Printed Record p. 133.

Was not that a complete recognition of the fact that John Crabb as well as Mrs. Crabb did not want him to take him away.

We submit to the court that John Crabb's testimony in relation to this matter bears the impress of truth and is convincing.

"Q. Did you ever say anything of that kind?

A. No, I didn't say anything of the kind.

Q. Did you have any feeling of that kind towards your wife's father?

A. No, sir, I did not.

Q. How did you feel about having him there?

A. My wife had helped take care of my father for fourteen years and the last three or four years he was almost as helpless as her father was and I felt grateful that I could help take care of him.

Q. Did you feel that it was any burden on you to help him?

A. No, sir.

Q. Were you grumpy about it in any way?

A. No, sir. I tried to be as pleasant as I could.

Q. Did you have any dislike for the old gentleman?

A. Not in any way. He was very nice and very easy to take care of for the condition he was in.

Q. And what did his feeling seem to be toward you?

A. Oh, he liked to see me come in. He always had a nice word to say to me and was always pleasant and

agreeable. He wasn't a grouchy man at all.

Testimony John Crabb, Original Record p.639 and 640. Printed Record p. 257-8

Mrs. Crabb testifies:

"Q. Did John at any time ever indicate in any way that he didn't want your father there?

A. No, sir, he did not. He always liked to have him there.

Q. How was he about being good to him when was there?

A. Just as good and kind as he could be, and father thought an awful lot of him."

Printed Record p. 252-3.

We submit again, therefore, that the conclusion is irresistible that the true reason for his being so insistent and determined to take the old gentleman away at the risk of hastening his death was to get him away from the Crabbs' and under the influence of Homer, his brother, so that some conveyance or disposition of the property could be obtained while the old gentleman was still alive. *He had learned that the will had been destroyed. He went down and consulted with his brother Homer and then hastened back and took his father out of the bed, carried him to the automobile, transported bim by automobile for eight miles to the railroad, put him in a baggage car and carried him one-hundred and forty miles to Athena then up to his brother's home, in a dray, and*

left him there—two days afterwards the deeds were executed.

They were obviously working together for a common purpose, he and his brother. On the morning that the deeds were drawn, and just before Mr. Watts was taken for the automobile ride with the intention, as Homer testifies of taking him up to the office to make these deeds, *Marvel Watts was there at the house.* He left at the same time they did, or only a few minutes before.

Printed Record p. 177.

Is it likely that they had not consulted about the deeds or talked the matter of their execution over in any way? We submit to the court it is unnatural.

Homer Watts pretends that he was bitter and angry about being left out in the disposition of the property, that he and his brother quarreled about the matter. He asserts this ostentatiously whenever opportunity offers. Two or three times in his direct examination he leads up to it hoping that he will be asked something about it on cross-examination and given an opportunity to include it in the case, for he was lawyer enough to know that it was incompetent and self serving.

When he notified the Crabbs about the deeds he filled his letter with the same claim.

When asked to produce this letter in his cross-exami-

nation he says: "You will see some good stuff in it."

(Testimony of Homer Watts, Original Record p. 472)

This was his idea all the time, that it was "good stuff" to put in the letter and good stuff to inject it into the case if he had an opportunity. This man is a cunning lawyer, with experience in such matters, and smart enough to know that if he could make it appear that he was bitter and angry and as he says "sarcastic" about the matter it would be "good stuff" in the support of these deeds.

Yet, in spite of his claim that he had lost his patrimony and been deprived of his share in his father's estate worth forty or fifty thousand dollars by these deeds, and in spite of the claim that he was bitter and angry and sarcastic about it,— almost immediately afterward, his brother turns the deeds *over to him* to be recorded and he considerately *agrees to record them.*

Not only this, but he becomes the attorney for the estate and joins with his brother in settling it up, joins *in selling the unencumbered property* to pay off the mortgage on the *property deeded to Vernita.*

Printed Record p. 171.

When the estate is insufficient to pay off all the expenses he and his brother divide what is left after paying the debts—*equally between them.* He and his brother continued to farm all the land conveyed in partnership

as they had before and continued to farm even the property ostensibly sold to Legrow.

They buy other property together in partnership in Montana.

Printed Record p. 174.

And when it comes to the trial of this case Homer Watts sits by in the case taking just as active an interest in the support of these deeds as his brother Marvel,— a far greater interest than either of the other defendants.

We submit to the court, from the first to the last, that his whole action and conduct is inconsistent with his claim, and is unnatural and unreasonable, if as a matter of fact he had been deprived of his interest in his father's estate as he claims.

We submit to the court that it is more than reasonably plain, that the making of these deeds was planned and schemed out beforehand and that Homer and Marvel were working together hand in hand in the matter.

The reasons for making the deeds to Mrs. Marvel Watts and to Vernita instead of directly to Homer and Marvel are obvious. Homer could not take the acknowledgement of the deeds nor witness the same if he was one of the grantees. In that case it would be necessary to call in a disinterested Notary and to have some one else draw the deeds.

It is not likely that there was any responsible Notary available, who could be relied upon to stand in, like Guy Jonas, and anyone drawing and acknowledging the deeds, would necessarily know the condition and circumstances under which they were executed, and something of the influence that was brought to bear.

Marvel Watts, on the other hand, had been taxed by his father in the presence of the Crabbs with his purpose to get him down to Athena for the purpose of getting hold of the property.

He had solemnly pledged himself, in the presence of Mr. and Mrs. Crabb and their daughter that the property should be equally divided and that the would not influence the old gentleman in any way to do otherwise.

Testimony of Mrs. Crabb, Printed Record p. 132-133.

Testimony. John Crabb, Printed Record p. 144;

Testimony Viola Wheeler, Printed Record p. 125.

No doubt at that time Marvel had not made up his ind to deny the conversation in the presence of all these people as he finally does on the stand. So, if the property could be deeded to his wife and his daughter ostensibly *without his previous knowledge* then he could still claim to have kept his pledge to them. Again he and Homer no doubt thought it would be easier to sustain a deed conveying the whole property to Mrs. Watts and

Vernita, than if the deed was directly made to Homer and Marvel.

They could find witnesses to testify that the old gentleman did feel kindly towards Mrs. Watts and the little girl—just as he felt kindly towards his daughter Jerusha and her children—and that they had been kind to him—just as his daughter and her children had been kind to him. It was not so easy to prove that he felt kindly toward Homer or Marvel.

Just what was said to the old gentleman and just what were the inducements offered and the importunities and persuasions used to get him to sign the deeds, if he did consciously sign them at all, of course we could never make appear in detail. unless we could call back Thomas J. Watts from his grave, or read the hearts of Homer Watts and Marvel Watts into the record.

Fortunately we are not required to do this or to show any direct evidence of what transpired, as will be seen from the authorities already cited

See also succeeding pages 121 to 123

The defendants themselves, by the secrecy in which they have enveloped this transaction have made this impossible.

INTENTION OF THOMAS J. WATTS THAT HIS DAUGHTER JERUSHA SHOULD HAVE HER SHARE.

The undisputed testimony shows that it was the intention of Thomas J. Watts during the last years of his lifetime that Jerusha should have her share.

As is usual with old men he talked a great deal about his property and the disposition of it in his last years, and indeed, he seems to have worried for fear Homer and Marvel would deprive his daughter Jerusha of he interest.

Skelton testifies:

"He frequently mentioned (during 1912-1913) that he wanted his children to share alike in his property, from the way that I understood him all the time—at these times he mentioned Homer and Marvel and Jerusha, the only daughter he had as I understood it."

> Skelton p. 45, cross x. p. 53-54. Printed Record . p. 120.

This witness was absolutely disinterested. He was a stranger to all parties except the old gentleman. He did not know the Crabbs at all until he came down to testify in their cause. It is true that the defendants have involved him in a scandal long years ago about the old gentleman and Mr. Skelton's wife. But, whatever may have been the merits of that scandal, or de-

merits, it is plain from the evidence that during all the later years of his life the relations between old Mr. Watts and Mr. Skelton were warm and kindly, and this would not be likely, if he had wronged the old gentleman in any way.

However this may be, as we have said he has no interest in this matter at all, and his testimony is reasonable and consistent with that of the other witnesses in the case.

Then, Mr. Parker, who was an old friend of Thomas J. Watts and an old friend of the family and who was raised with the Watts boys and knew them far more intimately than he did the Crabbs testified:

"He said he wanted her (Jerusha) to have her share of the property, that she was his child the same as the boys were."

Testimony Parker, Vol I p. 4, Printed Record p. 113.

Again at the time he asked him to write for the will he said he was not satisfied with it and his conversation would lead a person to believe it was because he wanted Jerusha to have her share of the property. He said "she was his child the same as the boys and he wanted her to have a part of his property."

Parker, Printed Record p. 113.

Viola Wheeler testifies:

"That he always talked and acted as though he thought "Mama ought to share equal with the boys in the property."

Viola Wheeler, Printed Record p. 127.

Mrs. Crabb testified:

"At different times before that he said he wanted us three children to divide it equally * * * it seemed to be on his mind continually."

Mrs. Crabb, Printed Record p. 132-133.

And John Crabb testified:

"I have frequently heard him say he wanted my wife to have one-third of the property."

Printed Record p. 145.

The Court below saw all these witnesses upon the stand, heard their testimony and observed their manner, and was impressed with their truthfulness.

Opinion of Court Record p. 87-91.

It is true that at one time when he was living with the plaintiff's stepmother and with the boys constantly around him, and when her natural claims upon his bounty were dulled by time and distance, he had intended to give the property to the boys and had made

numerous wills in their behalf, and no doubt this state of mind continued for a year or two after the divorce from his wife.

But after the divorce the close ties of blood and affection for his daughter were resumed. And especially during the last year or two before he died it is entirely plain that he had become very much attached to her. We merely allude to the close relations between Jerusha and her father in this connection. We shall discuss it more extensively in another bearing.

It is a significant thing that no one of these witnesses, Skelton, Parker, Viola Wheeler, Mr. and Mrs. Crabb say one word about any intention to give any property to his daughter-in-law or to his grand-daughter. Indeed, there is not a word from the lips of any witness except the two who planned these deeds, Homer and Marvel Watts, to ever indicate that at any time the old gentleman ever had any intention of giving to his daughter-in-law or grand-daughter any considerable portion of his property.

We submit again that if human evidence can establish anything it clearly establishes the fact that at the time he was taken away from the Crabbs on the 11th day of April, 1914 he fully intended that his daughter

should have her equal share of the property with her brothers.

Why, then, did he change his mind *three days later*, without anything occuring to disturb his kind feelings toward her, *absolutely disinherit her and give ALL of his property to a daughter-in-law who was not of his blood and to a grand-daughter who was only remotely so*, and leave Jerusha, without a single dollar from his estate,—without even the bit that he had always left her in the wills which he had made while living with her step-mother, and while his relations with her were remote and distant.

Mr. Watts was not a man, when he was himself, to talk lightly or who was deceitful in his character.

Homer Watts himself testifies that his father was a man of sober habits, straight-forward and not deceitful *and meant exactly what he said*.

Tes. of Homer Watts, Printed Record p. 164.

Then, unless all this undisputed evidence is untrue, unless all these five witnesses wilfully perjured themselves it cannot be gainsaid that it was his fixed intention when he left the Crabbs on April eleventh that Jerusha should have her share of the property, and that his sons should have the other two-thirds.

This was the conclusion of the learned trial Judge, who heard the evidence in the Court below.

We submit that the conclusion is irresistible that if

the old gentleman ever consciously signed these deeds at all *some* influence intervened after he came down to Athena to change his purpose.

*Now, view this in connection with the old gentleman's helpless condition, his utter dependency upon Marvel and Homer for every care; the suspicious circumstances that surround the transaction; its secrecy; the sending away of the nurse; the bringing there of Guy Jonas, the saloon-keeper,and friend of defendant, Homer Watts, as the only witness,*the way he was taken out on the street by Homer on that day, and that day only, of all the time he was there, and all the other badges of fraud that surround the transaction, and can anyone doubt whose influence it was that caused the change of mind on the part of Thomas J. Watts, three days after he had left his daughter, or the character of that influence?

View all this in the light of the character of the conveyances and the manner in which they purport to have been executed, and that by them he stripped himself *during his lifetime,* entirely of more than one-half of all the property that he had in the world and of all right to sell or encumber the remainder.

We submit to the court that if these deeds can be sustained under such circumstances that it is manifestly impossible to ever set aside fraudulent conveyances of this kind, where the parties thereto are cunning enough to involve the transaction in sufficient secrecy and

choose an occasion when there are no direct witnesses except themselves.

STRONG ATTACHMENT BETWEEN OLD MR. WATTS AND HIS DAUGHTER JERUSHA.

We are not contending that this strong attachment had always existed.

There was a time, no doubt, when this feeling of natural love and affection of a father for his daughter was greatly dulled by time and absence, and by the constant presence and influence of her step-mother and her half-brothers, who were inimical to her interests.

But we submit that the evidence shows conclusively that after the divorce of the step-mother, and especially during the last year or two of his life the natural love and affection for an only daughter was entirely restored.

She had nursed him through a sickness the winter of 1912 and again at the time of his death.

Printed Record p. 255.

He always visited her once or twice in each year and stayed from three weeks to a month or six weeks, and one winter he had stayed with her all winter.

It is not denied that she was getting letters from him once or twice a week all the time during the last few years of his life.

Printed Record p. 128.

Skelton testifies that his feeling towards Jerusha seemed to be the very best; "He used to talk about her quite often and he would correspond with her. He used to look for letters from her quite often, and he used to tell me when he was talking about his property—he would say that he expected them to share alike in it."

Skelton, Printed Record p. 121.

And again; on cross examination: "He spoke of his daughter Jerusha a great many times and he seemed to think an awful lot of her."

Skelton, Printed Record p. 122.

"He used to say that he would go there when it was disagreeable for him other places. She always treated him well."

Skelton, Printed Record p. 122.

John Crabb testifies:

"He came to our house after he and his wife seperated

regularly about twice a year. He usually came in the spring and then came back in the fall. He usually stayed about a month or six weeks. One time he stayed all winter. He traveled around and stopped wherever he wanted to and stayed as long as he wanted to.

Printed Record, p. 141-142.

Viola Wheeler testifies that for the last six years before her grandfather died he was at their place two or three times every year. He stayed a week to a month each time.

"He always treated mama as though he though a great deal of her."

Printed Record p. 127.

Mrs. Crabb testifies:

"After he seperated from his second wife, (nine years ago), he was with me a great deal more, came to see me quite often."

Printed Record p. 128.

"The last three years befor he died he was there, (at Mrs. Crabbs' home) a great deal and wrote to me regular."

Printed Record p. 128.

"The last two years he wrote me every week, scarcely a week passed that I didn't get a letter—over ten days."

Printed Record p. 128.

"Six years ago last fall I believe it was in September he came to my place and stayed three or four weeks, then he went up, as I understood, to Mr. Skelton's and I think he stayed a month, at any rate it was the fore part of December he came back and stayed until the latter part of February with me. During that time he had a very hard sick spell with the grippe. *We nursed him through that sick spell.*"

Printed Record p. 128.

In 1913, after he was sick in California; "I got a letter from him every week." "Sometime the latter part of February he wrote me that if he were not able to come by the fifteenth of March some one would have to come for him, and a few days later I got a letter from Mr. Thomas Page stting that he was much worse and that we would have to come and get him."

Printed Record p. 129.

Indeed, his love and attachment for Mrs. Crabb is nowhere disputed by any witness, and on the contrary, the very witnesses for the defendants corroborate the witnesses for the plaintiffs in that regard.

Dr. Sharp testifies that he always spoke well and kindly of his daughter Jerusha—seemed to think a good

deal of her. Said she always treated him kindly. I knew that he was going up there to visit her pretty often and never heard him complain of her treatment in any way—think he complained that the boys did not talk to him."

Testimony of Sharp, p. 366. Printed Record p. 195

And even Taylor who seems to be the strongest partisan in the whole case outside of the immediate parties testifies:

"Q. Didn't he tell you whether she, (Jerusha) was good to him or not?

A. Oh, he said all of his children treated him well, that is except Homer,—Homer didn't treat him well.

Q. He said she treated him well?

A. Yes, he said he was going up to see her, to stay with her awhile.

Q. He said she was good to him?

A. Yes, she waited on him.

Q. Waited on him?

A. Yes."

Printed Record p. 184-5.

Indeed, if anything else besides his constant letters to her during the last two years of his life and the testimony of these witnesses were necessary to establish the

warm affection between old Mr. Watts and his daughter, it would be supplied by his own actions after he came back from California just a few weeks before his death. After a good deal of equivocation Marvel Watts admits that he did not get the telegram to go down for his father until the 28th—the last day of February.

Printed Record p. 210

He says that he was gone over a week so that it must have been at least the eighth or ninth of March before he got up to Athena. *He stayed there then only about a week* and then he *insisted on going up to his daughter's.* It is testified by all the parties that Marvel took him up there on the 17th of March. Then the old gentleman remained there until the 11th of April or over three weeks and then, according to Marvel's own admission, *he did not want to leave or go back to Athena.* This shows, we submit, *where the old gentleman's real heart affection lay.*

There is an attempt on behalf of the defendants all through the case to make much of the fact that the old gentleman felt kindly toward his daughter-in-law and his grand-daughter and that they had been good to him, and taken care of him when he was there and performed little attentions like lacing his shoes, etc.

But these little attentions were *no more than had always been administered to him when he was at his daughter's home.*

Mrs. Crabb testifies:

"Q. Now you have heard the testimony of Mrs. Marvel Watts and Vernita as to being good to your father when he was at their house?

A. Yes, sir.

Q. How were *your* children towards him when he was at your house?

A. They were good to him.

Q. How did they feel towards him and him towards them?

A. They though lots of him. *He seemed to think an awful lot of them.*

Q. Now there was some testimony about lacing shoes, who laced his shoes for him at different times when he was at your house?

A. I or my daughter, one or the other, either one of us, which ever one of us was around waited on him.

Q. Now, did you make any hardship of that or were you glad to do it?

A. We were glad to do it. We were glad to. He was always easy to please and pleasant.

Q. During the last six years how many times have

you nursed him through sickness?

A. Never through sickness but once, until this last sickness.

Q. Well, that makes twice then, altogether?

A. Yes.

Q. When was the first time?

A. Why, it was three years before he died. The winter three years before he died.

Q. How long was he sick at your house that winter?

A. He came to my place the fore part of December, stayed until sometime the latter part of February.

Printed Record p. 254-255.

* * *

Q. Well, now, who took care of him and nursed him through that sickness?

A. I did, and my daughter. She was there.

Q. Now then, this last sickness. Did your daughter help you take care of him then?

A. Yes, sir. When 'I wasn't there she took care of him.

Q. During this last sickness was your toilet in the house or outside the house?

A. Out of the house.

Q. Was he able to get to the toilet during all the time that he was up there?

A. No, sir, he never went out of the door after the first morning he was there.

Q. He went out the first morning, did he?

A. Yes, sir. After that he never was out of doors until they carried him out.

Q. After that you attended to him in the house didn't you?

A. Yes, sir.

Q. Did your daughter help you about that?

A. Yes, sir, lots of times.

Q. Did you think that was any hardship?

A. No, sir.

Q. You were glad to do that?

A. Yes, sir.

Q. At this time when he was sick three years before denied, did your husband help you to take care of him?

A. Yes, sir.

Q. Now was he—was he glum or was he cheerful about it?

A. He was always cheerful.

Q. Did he seem to think it was a burden at that time to help take care of your father?

A. No."

Tes. of Mrs. Crabb p. 56-57. Printed Record p. 255-256.

We do not question that the old gentleman's relations with his daughter-in-law and his grand-daughter were pleasant and kindly. But we submit that all the evi-

dence, all his actions, all his conduct show that *during the last years of his life he thought more of his daughter Jerusha than he did of them or of any person in the world* —as it is only natural that he should toward his own only daughter.

We submit again, therefore, in this connection that there was no reason why he should have changed his mind within the three days before the deeds were drawn and disinherited his daughter for whom he had the closest love and affection, and given every dollar of his forty or fifty thousand dollars worth of property to his daughter-in-law and his grand-daughter. Is it not reasonable to presume there must have been some unfair and unreasonable pressure to have so speedily brought about so unreasonable a result?

THE RELATIVE CIRCUMSTANCES OF MARVEL WATTS AND HIS FAMILY AND JERUSHA AND HER FAMILY—THEIR WEALTH FAR GREATER THAN HERS.

There is an attempt all through the case on the part of the defendants to justify the effect of these deeds in disinheriting Mr. Watts own daughter for the benefit

of more remote kindred; because she had received about nine-thousand dollars from her uncle's estate, which had been invested in the common property of herself and her husband, and helped to make the $32,000 which they were worth at the time of her father's death.

This contention might be of more force if Marvel Watts and his family had been themselves poor and in want at the time or if they had received no property from outside sources.

But, as a matter of fact, according to the evidence, Marvel Watts and his family were worth at least sixty-five or seventy thousands dollars—at least twice what the Crabbs were worth, (Printed Record p. 202), and both Marvel Watts and his wife had received large sums by inheritance from outside sources, and this was well known by Thomas J. Watts prior to the time of his death. Marvel Watts himself, had inherited from his mother, or was about to inherit, she being in her last sickness and haviug made her will in his favor—a one half interest in his mother's estate, consisting of land worth at least $11.000 according to their own estimate, and a house and lot in Athena and perhaps other property, all of the value of at least $12,000 or $13,000. He was worth besides at the time, according to the evidence, at least $40,000 or $50,000. He had large amounts of valuable land, a block of shares in the mill stock and another block of shares in the bank, all of which not only represented their par value but a considerable surplus.

His wife had inherited in her own right $8,000 in money, a block of shares in the milling company and a house and lot in Walla Walla, so that the fact that Jerusha had received $9,000 from her uncle offered no reason whatever why she should receive nothing from her father, or why he should give *all* of his estate to these remote kindred, one of whom was not even of his blood, and leave his own daughter without a cent.

Neither Mrs. Marvel Watts or her daughetr, Vernita, were in a position of want. As we have already seen she was wealthy in her own right and in the right of her husband, and Vernita was the only child who would, in the course of nature, inherit the wealth not only of her father, but also of her mother.

Under the circumstances it might have been natural for Mr. Watts to give *part* of his property to Marvel or to Marvel's family, but where is the rational explanation of the alleged act by which he gave *all* of his property to them and left his daughter nothing, although she was closer to him by blood, closer to him apparently by love and affection, and although her circumstances were comparatively moderate and she had six children, all of whom were grandchildren of Thomas J. Watts, just the same as his grand-daughter Vernita.

We submit to the court again that from whatever angle we approach this alleged conveyance it seems equally unnatural, impossible and unreasonable.

MR. WATTS' SENILE, FEEBLE AND HELPLESS CONDITION PRIOR TO THE MAKING OF THE DEEDS.

We observe first that Mr. Watts was a very old man, eighty-two or eight-three years old at the least—long past the three score years allotted to man—past the four score which some men attain by reason of their great strength. According to both the doctors he was in a condition of senile decay. In such a case the mind goes with the body. Where a man is weakened by disease or injury alone the bodily powers may be weakened or destroyed and the mind retain its full power and activity. But this is not true in cases of senility.

In such cases, as we all know—in cases of the very old and senile the mind goes with the body.

Here the old gentleman was so far gone in senility that he was utterly helpless. He was unable to dress himself, unable to feed himself, unable to get out of bed by himself.

Tes. of Mrs. Carden, Printed Record p. 224.

According to the testimony during the time intervening from the third of April to the fourteenth when the deeds were drawn he had never been out of bed but twice, once when Marvel went up to St Johns and by a moral compulsion forced him to let him take him to Athena, when he was taken out of bed, carried to the conveyance,—and again when Homer Watts took him out of bed again against his objections, over his protest, and took him down town in the automobile.

Dr. McIntyre testifies:

"He was not in a very good condition to move."

(p. 26) Printed Record p. 116.

"I did not think that he was in an especially good condition to be moved, he was too weak."

(p. 27) Printed Record p. 117.

"Think I told him, (Marvel), he would not live very long."

Dr. McIntyre p. 28, Printed Record p.117.

"He was not able to walk into the train, we had him on a little stretcher or bed in the baggage car."

Dr. McIntyre p. 29, Printed Record p. 117.

"He was about as you would find an extremely old man after considerable pain and loss of rest—his mental faculties of course were not,—I did not figure they were clear except at one time, I was out there one day, just what day I forget, after we had to draw the urine, I guess, I thought that he talked rather pleasantly of things of the past."

Dr. McIntyre p. 36, Printed Record p. 118.

"Q. Now what do you say Doctor, as to whether or not during any of that time that you teated him from the third to the twelfth of April, whether in your judgement he was in such a condition as to be able to intelligently manage his affairs or make an intelligent disposition of his property?

A. Well, I don't believe, if he had been left to his own initiative that he could have very well planned out anything that was at all complicated at any rate."

Dr. McIntyre p. 30-31, Printed Record p. 118.

Q. Now what do you say as to the prognosis or probable course of a trouble of that kind in an old man of his age and his condition when you saw him last, as to whether or not he was in a condition to intelligently dispose of his affairs?

A. Well, I think of course that would depend on the length of time he lived afterwards, but I didn't see a great deal of promise for him either physicially or men-

tally. Of course, I could not state that definitely, you understand."

Dr. McIntyre p. 31, Printed Record p. 119.

(Observe that Dr. McIntyre was with him until Sunday morning, and it is claimed the deeds were drawn the succeeding Tuesday, two days after.)

The Doctor proceeds further to state that the usual tendency in such cases is down grade. (p. 31)

"I was giving tonic doses of strychnine."

P. 31. Printed Record p. 118.

"He had a much better memory for the things past sometimes, than he did for the things present."

Dr. McIntyre cross x p. 36. Printed Record p. 119.

"I asked him about things that happened after he was sick, and he didn't seem to recall those."

Dr. McIntyre p. 36. Printed Record p. 119.

"On the train coming down you might go around him and you wouldn't know whether he was asleep or not."

Dr. McIntyre p. 39. Printed Record p. 119.

(And yet, Homer Watts claims that this old feeble man who had been taken out of his bed and hadn't been able to feed himself for two weeks and who had been

carried on this long trip, all day on the train in the baggage car, sat up and talked to him about his property matters until two o'clock that night.)

Dr. Sharp testifies:

"Q. You say he was suffering from a general senility when you first called on him? Old age?

A. Yes.

Q. He was a very old man wasn't he?

A. Yes, he was past eighty, I think.

Q. And in a feeble and senile condition?

A. Yes, he was feeble, very feeble.

Q. General break down?

A. General break down."

Sharp p. 360. Printed Record p. 193.

He never saw him out of bed all the time he was attending him.

Sharp p. 360. Printed Record p. 194.

He was very hard of hearing, you had to holler to make him hear. I didn't talk much to him.

Sharp. p. 360. Printed Record p. 194.

"I was giving him heart stimulants up to the time he took the cough Wednesday or Thursday."

Sharp, cross x. p. 361. Printed Record p. 194.

He took Dr. McIntyre's medicine for the first day or two."

Sharp p. 361. Printed Record p. 194.

(Dr. McIntyre's medicine was also a strychnine tonic

"I give strychnine for a stimulant, it brightens them up for a while."

Sharp p. 362. Printed Record p. 194.

"The stronger the dose the more it brightens."

Sharp p. 362. Printed Record p. 194.

He talked to me Tuesday morning and said Homer wanted to take him for an automobile ride, but he didn't want to go."

"I didn't think it was best, didn't think he was hardly able, when I was there I don't think he seemed able to get up."

"If I remember correctly he was not quite so well the next day. I think he had taken some cold. He began to cough then and he failed rapidly after that."

Sharp p. 363. Printed Record p. 194.

Again Dr. Sharp testifies:

"The first time I saw Watts after he came back was April 12th—in the evening. He was *very feeble and weak and exhausted.*"

Sharp p. 354. Printed Record p. 192.

Viola Wheeler testifies:

"He had not been able to get up by himself since

Marvel and his wife first came, (April third). The only time he had been up at all was about fifteen or twenty minutes one afternoon."

V. W. p. 69. Printed Record p. 125.

Mrs. Crabb testifies that he was very feeble and could not walk without support at the time he came back to her p..ace, on the 17th of March.

P. 93. Printed Record p. 130.

He grew weaker all the time he was there until he took the bad spell the third of April. He had several other spells before but not so severe.

"I used hot water bottle with alcohol. Marvel or Homer was not there from the time he brought him to the third of April."

Mrs. Crabb p. 93. Printed Record p. 131.

I don't think he was conscious while Marvel was there Don't think he recognized any of them, but on Wednesday after he left father got so he could talk to me and talked about their being there,—*thought Homer had been there.*

P. 95. Printed Record p. 131.

He was up a little while Wednesday afternoon and that was the only time.

Mrs. Crabb p. 95. Printed Record p. 131.

Do not think he was capable of doing any intelligent business after the third of April.

Printed Record p. 131.

John Crabb testifies that he was always talking about his property. That seemed to be more on his mind than anything else. That was the last two years—he got gradually worse that way.

Printed Record p. 142.

From the third day of April up to the time he left: "Some days for a few minutes he would seem to talk all right about something that had happened a good many years ago and things that he had told over thousands and thousands of times would come to his mind and he would tell it pretty good, and then afterwards he would have a spell *and if he started to tell you something he would forget what he wanted to tell you before he got through* and not finish the sentence.

Printed Record p. 143.

He seemed to be all right for a few minutes at a time —the balance of the time he would say most any kind of thing, and then he would say a word or two and stop. He could not even raise up in bed without help. I got up and turned him over at night.

Printed Record p. 143-4.

Old man Taylor testifies:

"I never saw him try to walk except the one time after he came from Jerusha's. That was the day he had been for a ride. That time he kind of crawled around and I got hold of him and helped him a little to the foot of the bed and back."

Taylor p. 325. Printed Record p. 187.

"Q. He couldn't walk then, without somebody helping him?

A. I don't think so, I didn't see him try.

Q. He had grown more feeble when you saw him the last time?

A. Oh yes, feebler all the time.

Q. Yes, getting more feeble and lower all the time.

A. Yes, sir.

Taylor p. 326. Printed Record p. 187.

Mrs. Carden, the nurse, also called as a witness for the defendants, testifies:

"Q. Now, with the exception of the time when he went out auto riding was he out of bed at any time while you were there until he died?

A. No sir.

Q. Never was?

A. No, he was not out.

Q. Never came to the table at any time, he wasn't able to?

A. Not while I was there.

Q. Not from Sunday morning until he died?

A. No.

Q. And on this day when he went out automobile riding did they take him out of bed?

A. Yes, sir.

Q. And who took him out of bed?

A. Homer Watts and I. I helped to put his clothes on."

Mrs, Carden p. 539. Printed Record p. 224.

And again:

"Q. Now the only time that he was up in his chair while you was there was that day when he went out riding and then he was up about twenty minutes, wasn't he?

A. Yes, sir, just put him in his chair.

Q. That is the only time he was in his chair while you were there?

A. Yes."

P. 549-550. Printed Record p. 235-6.

"He was so bad off I could not have put him to bed alone or got him from the dining room to the bed alone."

Mrs. Carden p. 551. Printed Record p. 226.

It is true that some of these witnesses for the defend-

ants testify that he seemed to talk rationally about his condition of health when they saw him down in front of the drug-store on the occasion of his last ride and some of the witnesses thought he talked rationally at different times while he was at the house, about simple matters like his health. It is impossible to say how far he was under the stimulating doses of strychnine at the time he was taken down town on the day in question.

As we have already seen both the doctors testify that they were giving him tonic doses of strychnine and that the effect of these tonic doses was to brighten him up for a while. And that the extent to which this would occur would depend on the size of the dose.

The defendants could not but have known that this stimulant was being administered and its purpose. A big dose had been given to him at St. Johns a short time before Marvel took him out and put him on the train for the purpose of enabling him to make the trip, and in the natural course of things they would know in a general way what medicine was being administered and its effect upon him.

At any rate , it is not necessary, even if we were depending upon mental weakness alone, for us to show that the deceased was absolutely insane or irrational, or that he was entirely laking in intelligence or consciousness.

See authorities p. 11 Et. seq.

On the contrary, it would be enough even to sustain mental weakness alone seperate from undue influence —that his mind had ceased to be a safe-guard for his business transactions—that he was so weak, feeble, helpless, senile, that he could not any longer thoroughly protect himself in business transactions of this kind,—that he could not longer marshal all his relations and fully realize what he was doing in stripping himself of his property and giving it without regard to his death to these benficiaries. It must be remembered that it is one thing to be able to answer simple questions in relation to a man's health—which even a crazy person or an imbecile might do—and another thing to be able to hold in one's mind the claims and relations of all his children and relatives and to look into the future and realize his own possible wants and necessities and provide protection for the same and make a just and intelligent disposition of a large amount of property such as he owned.

It must be remembered also that most of these witnesses were mere causual acquaintances who had known the deceased only two or three years. He was very deaf and difficult to talk to and there is not a single witness who claims to have held any extended or consecutive conversation with him.

Vincent who was one of those who talked with him at the drug-store testifies that he seemed bright, but on cross-examination he says:

"Q. You realized at that time that he was a man about to die, didn't you?

A. Well, yes, *I did.* He was an old man, but he was quite spry when I saw him down town. *He didn't look so near dead as I expected to see him.* I suppose I said that before I thought. I remember saying something about dying."

Mrs. Carden testifies that she thinks he was rational when she first got there, but admits that she could not talk to him much and that she could not really tell what was the condition of his mind. On cross eaxmination she says:

"Q. Just about as bright as any old sick man could be expected to be?

A. Yes.

Q. But he was very childish, wasn't he?

A. Well, I didn't talk to him very much, so I don't know anything about his being very. childish

Q. You couldn't tell very much about what was the condition of his mind?

A. No, I never talked much with him.

Q. And you never had known him before?

A. I never knew him before, 'til I went there.

* * * * *

Q. You wouldn't undertake to say whether he was in condition to transact important business or anything of that kind?

A. No, I wouldn't.

Mrs. Carden p. 541. Printed Record p. 226.

Taylor testifies to more conversation with the old gentleman than any other witness except Homer Watts, and he, too, thinks that he was rational. However, this witness is himself a very old man and his memory is evidently very bad indeed and we think his testimony is entitled to very little weight.

He says himself that he has talked the matter over and over with all the attorneys and admits that he gets mixed up and it is hard for him to tell what he remembers himself and what he was told by the attorneys.

"Q. Now he told you in that same conversation about the will didn't he that his daughter Jerusha did not get really as much as had been expected out of her uncle's estate?

A. I don't know as he told me that time or not—he must have told me,—I didn't know who else could. It seems like—I don't know but what it was you.

Q. What say?

A. I don't know but what it was you told me or that girl's husband that lives in Palouse—somebody told me,—whether it was Uncle Tom or you or that other man—that after he adopted this child he adopted two other children of someone and they divided up and didn't get so much. I don't know but what it was the night I talked with you and Crabb.

Q. Didn't you tell us that? Didn't you say that he told you that his brother had adopted and raised his daughter?

A. Yes, that is what I said.

Q. And he promised to give her all his property—make her his heir, but afterwards adopted two other children and she only got a third?

A. *Well, I ain't sure about that whether I told you that or you told me that.*

Q. You don't remember about that?

A. No, you got what I said.

* * * * *

Q. Well, you don't remember now?

A. *Well, if I did, just as I said here a moment ago I said Uncle Tom told me about the adoption of two others, or you or that gentleman*, but I am not sure which one. *Now, Uncle Tom might have told me that.*

* * * * *

Q. *You have talked with all the attorneys, pretty nearly, in the case?*

A. *I think I have.*

Q. *At different times?*

A. *Yes.*

Q. Do you have trouble sometimes in remembering it is what somebody else told you or whether it is something that the lawyers told you?

A. No.—Sometimes they get me tangled because they put questions in a little different form."

Taylor p. 317-318. Printed Record p. 185-6.

We submit that a witness whose memory is so poor that he cannot tell what he remembers himself and what

the lawyers have told him, is in the nature of things a weak support.

There are many other circumstances in the testimony of this old gentleman which go to show further how weak and unsatisfactory his memory is.

He claims that the old gentleman told him about the ride the first day he was there (Tuesday), and that a *day or two after* he saw him again and that at that time he said: I sent for Lizzie,(his divorced wife) *to-day* and she came down, etc."

Taylor p. 309-310. Printed Record p. 182-3.

Again he testifies:

"The first time I talked with him after he came back was the day he spoke of being out riding and the time when he spoke of sending for his divorced wife was the second a day or maybe two days after."

P 326. Printed Record p. 187.

Now, according to the testimony of the defendants the only time that his divorced wife was there was on Sunday, the first day after he came, so that either Taylor has the matter all mixed up in his memory or else the old gentleman was hazy himself and not in possession of his faculties. Because if Mr. Watts was in his right mind he would not be saying one or two days after Tuesday that "I sent for my wife *to-day*.

No doubt Mr. Taylor is honest enough, but in this case he has talked the matter over so much with the attorneys so frequently and his memory is so deficient that he has the matter all mixed up and he can't tell what conversation he really had with Mr. Watts from that which the attorneys have told him.

However, he admits that the old gentleman was getting feebler and lower all the time.

"Q. He couldn't walk then, without somebody helping him?

A. I don't think so, I didn't see him try.

Q. He had grown more feeble when you saw him the last time?

A. Oh yes, feebler all the time.

Q. Yes, getting more feeble and lower all the time.

A. Yes, sir."

P. 326. Printed Record p. 187.

Of course, it is hard to separate mental weakness and senility of the old gentleman from the matter of probable influence. But, if this could be done, we submit to the court that this old gentleman on his death bed from senility and who had not been able to feed himself or to get out of bed without help and even with help only twice in two or three weeks, and who had to be

kept up with a strychnine stimulant all the time as testified by the doctors and who had been more than half unconscious for two weeks and who lay in a stupor in the baggage train all day Saturday, as testified by Dr. McIntyre, was in no condition to protect himself or his future—in no condition to realize the effect upon himself in conveying away over half of his property and in putting the other half where he could not use it for the purpose of providing nursing or medicine or doctor's care for himself and could only have the small income from it through his lifetime.

Then we consider the question of influence, his constant assertion during the last few months of his life that he wanted his daughter to have her share, the suspicious circumstances under which he was forced out of bed and forced over the long journey from St Johns to Athena, the secrecy of the transaction, the haste in recording the deeds after he was dead, the sending away of Mrs. Carden and the calling of Guy Jonas alone as a witness,—all in addition to the mental weakness to which we have already called attention makes it seem to us an overwhelming case.

SENDING MRS. CARDEN AWAY AT THE TIME OF THE EXECUTION OF THE DEEDS AND BRINGING GUY JONAS TO BE THE SOLE WITNESS.

We submit to the court that the sending of Mrs. Carden away at the time of the execution of the deeds together with the fact that during her stay there (she was there all the time except on this ride) she *never heard a word about property or a word about deeds*, never saw any deeds or knew that any were drawn is very significant.

It is true the defendants attempt to explain this by claiming that it was a mere *coincidence*. That just at that time Mrs. Carden had wanted to go home and that she was peeved because she was delayed by the delay in the return of Homer Watts.

But is it significant even as a coincidence that this one time when they were getting ready and were all ready to draw these deeds was the *only time*, in all the time that she was there, that they ever found an occasion to take her out for a ride.

She does not say that she was peeved, though she does say that she wanted to go home for some purpose and that she availed herself of the opportunity to go home in the automobile when Mrs. Watts asked her to take a ride.

We think there never was a more halting and hesitating attempt to explain a thing than the attempt of the defendant Homer Watts to explain this. He says:

"When I came in—I had been much longer than I expected to be, *and I told my wife that she could take Mrs. Carden up to the house if she wanted to.* No, I told her to take the car and take Mrs. Carden. *That is what I told her.* So she took the automobile and took Mrs. Carden and they were gone possibly forty-five minutes or an hour. I think either Mrs. Carden or my wife said to me, 'How long will you be here?' And I said some little time if you want to go out a while. And whoever it was said they would be gone a little bit. They would take a ride, or words to that effect."

Homer Watts. Printed Record p. 153.

On direct examination Mrs. Carden testifies:

"Q. Did she say anything to you that induced you to leave the house and go away that afternoon?
A. No, sir, she did not."

But on cross examination she admits that Mrs. Watts *did* ask her to go and take the ride, and that she told that to both Judge Hanna of Spokane and to Mr. Bennett in separate conversations shortly after the transaction and when the matter was fresh in her memory.

"Q. Now, didn't you tell Judge Hanna that after they got back on Tuesday: 'I put the old man to bed

In the afternoon Homer's wife took me out for a ride. She asked me to go.'

A. Homer was there yes.

Q. Was that true?

A. Whether we went for the ride, yes.

Q. *And that she asked you to go?*

A. *Yes, she wanted me to go for a ride.*

Q. What say?

A. She wanted me to go for a ride, yes.

Q. You also told Judge Hanna that she never asked you to go riding on any other day while you were there?

A. Well, *she never did on any other day.*"

And in relation to the conversation with Mr. Bennett she testifies:

"Q. Didn't you say: 'Before they got back Mrs. Watts asked me to go for a ride when they got back and I said I did not care, and when they got back I went for a ride, leaving Homer, Jonas, and the old man there alone'?

A. Just how is that?

Q. Did you tell me that, I say?

A. I don't remember saying that. I said we went for a ride.

Q. Well, didn't you tell me that before they got back Mrs. Watts asked you if you didn't want to go for a ride?

A. Well, *she asked me to go for a ride,* but I don't remember just when she asked me that.

Q. You don't remember whether it was before or after?

A. No.

Q. And you said you didn't care, did you?

A. Well, I said I didn't care."

Mrs. Carden Printed Record p. 229-230.

John Crabb testifies that in the talk with Judge Hanna, Mrs. Carden said that Mrs. Watts asked her if she would take a ride with her in the car and she said "Yes, but she wanted to go home".

John Crabb p. 661. Printed Record p. 260.

And this is no doubt the truth. Mrs. Watts asked her to take a ride and she then suggested that she would like to go home. (Her home being in the same town and only a few blocks away.)

We submit therefore, that it is an unavoidable inference that—the sending of Mrs. Carden away just at this time, the only time that she was sent away from the house or went away from the house and the only time she was taken out for a ride during the week that she was there was not a coincidence—but that she was taken away just at that time for a purpose. *The fact that the old gentleman was taken out of bed, put into his chair, the deeds executed, acknowledged and witnessed, and the whole transaction closed up and the papers put out of sight before*

Mrs. Carden returned, so that she heard or saw not a thing about it strengthens the conclusion.

PRESENCE OF GUY JONAS.

The defendant also claims that the presence of Guy Jonas at that time,—Guy Jonas the saloon-keeper and the debtor and protege of Homer Watts,—was another coincidence. He just "happened" to be there. He just "happened" to come up that morning and be there at the time when the old gentleman was being taken out to the automobile. He had come clear up to the house to see Homer Watts about the collection of a note. He went back down to the office,(was he expected to be a witness there if the deeds had been drawn there?) and he happened to be in the office just at the right time to be brought up again by Homer Watts to be there as the sole witness to the execution of the deeds.

Guy Jonas was not only the warm friend and debtor,—whom Homer was backing in the saloon business,—but he had just shortly before been a witness for the defendant Homer Watts in another will contest in which the defendant was trying to possess himself of the property of an aged Indian who had died on the reservation. Whether Guy Jonas has other interests with the defendant does not appear. The testimony shows that the Watts had bought 800 acres of land in Montana,(Printed Record p. 174) and that Guy Jonas

is now *living up there and farming,*(Printed Record p.175) but this may be just another coincidence, and it may be that he is not farming *their* land.

A witness was absolutely necessary, and no better selection could have been made if Homer Watts *was* trying to cover up a shady transaction.

Why should Homer Watts pass by all the responsible business men in the town of Athena,—men who were absolutely independent and under no obligation to him. Why should he pass by all the neighbors who reside in the same block, some of them only a hundred or a hundred and fifty feet away, (Printed Record p.204) and secure this saloon-keeper who had been a witness for him in like matters—and who was in his debt and under obligations to him—to be the sole witness to this transaction. The only person in all the world, except the parties themselves, who was to have any knowledge of it whatever.

Homer Watts testifies in relation to the presence of Guy Jonas:

"Guy Jonas was there and helped me put him in the car." (p.248)

"Guy Jonas was in the saloon business. He came up to the office to see about a note I had for collection and went up with me to the house."

P. 248. Printed Record p. 167.

In the afternoon when Jonas came back from the

office; "Either I suggested that he go up to see father or he suggested going up to see him."

Homer Watts p. 272. Printed Record p. 172.

He evades about Guy Jonas having been a witness for him in the Indian case.

"Q. And he was one of your principal witnesses wasn't he?

A. No, he was not a principal witness,—nowheres near it.

Q. Wasn't it by him that you proved or undertook to prove the sums of money, the different sums of money that you claimed to have let this Indian have?

A. Guy might have known something about it, but he was not the one that proved the money I let him have by any means and was not the one to prove any material issue of that case that I can remember of at this time.

Q. Wasn't he there almost every day while that hearing was pending helping you in the case?

A. Why, I can't say that he was.

Q. You can't say that he was?

A. I think he took evidence two days. He might have been there both days, the chances are, like the witnesses are here, possibly was.

Q. You had him testify that you had left a good many sums of money in his saloon for this Indian at different times and that he had paid it over to the Indian when he came in?

A. I would rather the record in that would be shown rather than for me to go to work to reiterate.

Q. Don't you remember that?

A. I don't know. There were volumes of that.

Q. Don't you remember leaving money there at his place for this Indian?

A. Possibly I did; I don't say that I didn't.

Q. Don't you remember whether you did or not?

A. At this time I do not remember."

Homer Watts p. 252.

Guy Jonas admits that he was a witness for Homer Watts in the Laroque case and was there every day of the trial

P. 299. Printed Record p. 179.

"Q. Did you have any money borrowed from him, Homer Watts?

A. I did.

Q. To run the business, (saloon)?

A. Yes.

Q. You had money borrowed from him to run the business at that time?

A. I don't say what I am using the money for, but I have money borrowed of him.

Q. Well, were you using it to run the business?

A. Not necessarily altogether.

Q. Well, partly?

A. Hum-m-m"

Jonas. Printed Record p. 178-9.

He undertook to tell just what was said between Homer and the old gentleman, yet in a response to the court he is unable to tell a single word of the acknowledgment.

Printed Record p. 180.

He says: I am engaged in farming in Montana."
Jonas. Printed Record p.175.

Homer Watts testifies:

"My brother and I are jointly owners of about 700 or 800 acres of real estate. * * * * A year ago last fall I started to go to Montana and he had a chance to buy some land out there, said if I would buy with him he would go halvers with me on it."

Homer Watts. Printed Record p. 174.

UNSEEMLY HASTE TO RECORD DEEDS AFTER FATHER'S DEATH.

According to the evidence old Mr. Watts died at eight

o'clock on the morning of the 20th. At 11:20 and 11:25 of that day the deeds were offered for record. As we have already seen from the authorities, this as well as the secrecy of the transaction is a badge of fraud.

The defendants, however, undertake to explain this as another "coincidence." They claim that Marvel Watts had been trying to get them recorded all the time from the time of their execution up to his father's death, but because of intervening circumstances he was unable to do so and that they only "*happened*" to be recorded on the same day as his father's death and only a few hours after. Both he and Homer claim that he gave them to Homer to have them recorded the same day they were turned over to him and that Homer (the supposedly bitter, disinherited brother) agreed to have them recorded and did intend to have them recorded but failed to do so from an oversight, so he brought them back on Saturday and gave them to Marvel again, and that Marvel *took them to the bank on Saturday morning at eight o'clock and gave* them to Legrow to have them sent down for record.

It is not explained how Legrow came to hold them back until Monday at 11:25 but Legrow thinks, (although he has no clear memory) that he sent them down by mail *and sent with them a blank check for the recording fees*. (Record p. 189 and 191.) :Legrow does not claim to remember when he got them or whether it was before or after the death of Mr. Watts (Printed Record p. 190) and he has no personal memory of

whether it was sent through the mail, although he thinks they probably were in the usual course of business.

What a number of unfortunate circumstances and happenings are involved in the explanation of this coincidence, that the deeds were offered for record only a few hours after Mr. Watts' death!

But, let us see how this explanation is borne out by the facts and whether or not as a matter of fact the deeds were sent to be recorded by mail at all or not, and whether or not they were ever given to the bank on the Saturday before the old gentleman died, unless it was for safe-keeping.

Burroughs, the recorder, called for defendants has no personal recollections as to the circumstances of receiving deeds.

Printed Record p. 244.

He can testify only as to what his record shows and the only thing that his record shows of importance is that the deeds were received for recording at 11:20 and 11:25 and that they were to be returned to the Athena bank.

Printed Record p. 249.

We think the fact that they were to be returned to that bank is unimportant. It is very evident from the testimony in the case that there was where the Watts boys usually left their papers for safe-keeping, and if they had left the deeds for record in person at 11:20 on Monday as shown by the record or if they had sent them to the recorder on that morning by a special messenger they would probably have directed the recorder to return them to the bank when recorded. So that whether they were sent by mail or delivered to the recorder in person the entry as to where they were to be returned would be the same. While the recorder assumes that they were sent by the bank on account of the entry as to where they were to be returned, yet he admits on cross-examination that there were no entries in his books whatever as to the person or bank from whom he had received the deeds—the only entry being as to whom they were to be returned.

Printed Record p. 247.

Mr. Burroughs also testifies that he opens his office at eight o'clock, that he stopped to get the mail at the post-office as he came down, and that any bunch of deeds received from the mail would be recorded one minute apart commencing at eight o'clock. Now, on this particular morning his record shows that there were sixteen deeds to be recorded, one minute apart commencing at eight o'clock and ending with 8:15. *These deeds were not among that bunch.* Then, there was one deed filed at 8:30, the next one at 9:45, then one at 10:05,

and then came these two deeds filed at 11:20 and 11:25 respectively.

Tes. of Burroughs, Printed Record p. 244 to 248.

So that it is perfectly apparent *that these deeds were not in the post office at Pendleton on Monday morning when Burroughs got the accumulated mail from Saturday and Sunday from that post office.*

Now Marvel Watts testifies that he left the deeds at the bank to be sent down for record at eight o'clock *on Saturday morning.* Mr. Burroughs testifies that the mail at that time came in from Athena *twice each day, once about eight or nine o'clock in the morning and once about five o'clock P. M.*

P. 609. Printed Record p. 248.

Now, if Marvel Watts left these deeds at the bank to be sent down for record at eight o'clock on Saturday morning, they would in the natural course of business *have been deposited in the mail before the bank closed that day and would have come down on the mail that reached Pendleton at five o'clock Saturday afternoon.*

Another thing, if these deeds were not deposited in the mail Saturday before the close of banking hours *they would not, in the ordinary course of business have been deposited before the opening of the bank on Monday,* because the bank is closed on Sunday and does not open in the ordinary course of business *until nine o'clock Monday morning.* That would have been *too late to*

deposit them in the mail Monday morning and have them come down to Pendleton on the first mail which reaches Pendleton at eight or nine o'clock So that if they were deposited in the mail after the bank opened Monday they would not have reached the Clerk's office until evening. So that in the ordinary course of business these deeds if deposited in the mail at all at Athena by the bank must have been deposited sometime during banking hours on Saturday.

Now, as we have seen, if they had been deposited by the bank in the post office in the usual course of business on Saturday they would have come down in the mail *on Saturday afternoon*, reached Pendleton *at five o'clock Saturday* and been distributed that evening. If they had come down any time *Saturday or Sunday* they would have been in the bunch of mail that had accumulated in the post office over Sunday, and *would have been received by the recorder in the first bunch*, and recorded by him consecutively with the sixteen deeds so received and recorded ,commencing at eight o'clock one minute apart.

Burroughs, Record p. 248.

But these deeds, as we have already seen were not recorded *until 11:20 and 11:25, and were recorded by themselves* and not *in a bunch*, as would be in the case if they had been received by mail.

We refer to the important part of Mr. Burrough's testimony.

Has no personal recollection as to circumstances of receiving deeds.

Direct p. 605, Cross x. p. 606-607, Printed Record p. 245.

"I opened at eight o'clock"

P. 606. Printed Record p. 244.

"At that time I stopped and got the mail as I came down."

P. 606. Printed Record p. 245.

"Ordinarily when I got a whole bunch in the mail I would file them a minute apart—

"Q. File them the same date, one a minute after the other?

A. Yes, yes."

Burroughs p. 607. Printed Record p. 246.

The record does not really show from whom they were received, but "to whom delivered." "Usually they were delivered to the same person from whom I received them."

"Q. Deeds were not always returned to the same one?

A. No, that is not always true, but it is usually true.

Q. Now you would put down there whom they were to be returned to wouldn't you?

A. Yes, sir.

Q. It might be the same person who delivered them or it might not?

A. That is true.

Q. Now, if any one had come in and brought these deeds and told you to return them to the First National Bank, you would have put down the same entries, wouldn't you?

A. Yes, I would, Yes.

Q. Just the same entries exactly?

A. Yes, I would."

Burroughs Printed Record p. 274.

The mail came in from Athena twice each day, once about eight or nine in the morning and once about five P. M. (p. 609)

"Now Mr. Burroughs, I wish you would examine this book and see how many deeds were filed for record on the 20th, before these two.

A. Let's see, 1—2—3—4—5—6—7—8—9—10—11—12—13—14—15——. 20 instruments were filed prior to these two.

Q. *Now the first sixteen of them were right along one after the other?*

A. Yes sir, yes.

Q. That is the first commenced at eight o'clock.

A. Yes.

Q. Then the next at 8:01?

A. Yes.

Q. And the next at 8:02:?

A. 8:02.

Q. The next at 8:03?

A. The next at 8:03—4—5—6—7.

Q. And so on.

A. Up to fifteen.

Q. Now the fifteenth one was filed at 8:15, wasn't it?

A. Yes.

Q. Then the next one was filed at 8:30 wasn't it?

A. That is right.

Q. Now the next one was filed at 9:45 wasn't it?

A. 9:45 that is right.

Q. And then the next one was filed at 10:05, wasn't it?

A. 10:05, yes.

Q. And then the next ones, these two, that were filed at 11:20 and 11:25?

A. That is right."

Printed Record p. 248-9.

So, we submit to the court that it is perfectly plain that these deeds never came to the recorder's office through the mail at all.—That they did not come in the bunch through the mail as they would have done if they had come through the mail at all. But, on the contrary, that they were taken to the office singly and in some way that would cause them to arrive there at the hour of 11:20 in the morning. *In other words they were sent by a special messenger who arrived there with them three hours after the old gentleman's death.*

This conclusion is still further strengthened by the fact that the defendants *did not produce the check which would have accompanied these deeds if they had been sent through the mail.* Legrow testifies that there would have been such a check if the deeds had been sent in that way.

Tes. of Legrow, Printed Record p. 191.

Such a blank with only the amount to be filled in would have had the date and would have shown, (if there was any such check) the exact date at which the deeds were sent down. Legrow's testimony in relation to the matter is very indefinite and unsatisfactory.

He says he presumes that he mailed the deeds—usually does— it is possible he had them in his possession but does not know whether it was before or after Watts died—did not see them except the backs. Does not remember whether they were inclosed in an envelope. Made no charge in the estate account. Does not remember whether he made one in Marvel's account or not. Is asked to produce the check but does not. Does not think there was any letter but just the blank check.

Legrow, cross x. Printed Record p. 190-191.

Now although defendant's attention is called to this matter and they are challenged to produce the check they do not do so.

It is an elementary proposition of law that where "stronger and more satisfactory evidence is in the power of the parties and they fail to produce it it will be presumed that the evidence would have been against them if produced."

They do not offer this check or account for its absence in any way.

We have a right to assume, therefore, either that there *was no check* or that if there was one *it was dated on Monday,* and would show that the deeds were hurried down to the recorder after the death of Mr. Watts.

Again, *why should Marvel Watts have taken these deeds over to the bank to have the bank mail them* to the recorder. He was himself a business man well educated, perfectly able to write. His check, being a well known business man would have been just as good as the check of the bank. Why didn't *he* put the deeds into an envelope and mail them down to the recorder directly himself? The bank was not his secretary. Why should he expect them to attend to a matter of that kind.

Very likely these deeds were *left* in the bank for *safe-keeping* at some time, as Legrow says, either before or after they were recorded, but that Marvel Watts' statement as to how they reached the recorder's office is false seems reasonably apparent.

The haste in recording these deeds after the old gentleman's death is itself, as we have already seen, a badge of fraud.

(Wolf vs. Harris, supra)

But when they undertake to impose upon the court by covering it up by these false statements by which they cunningly undertake to explain how they came to be rushed to the record at this undecorous time, makes the presumption tenfold more forceful.

Now view these false statements as to how the deeds came to be offered for record so immediately after the death of their father, in the light of the contradictory statements which Marvel and Homer Watts have made as to the circumstances of the drawing of these deeds and the knowledge of Marvel Watts that they had been executed.

Defendants *now* claim that Marvel Watts knew about the deeds and that they were delivered to him the day

after they were executed. A few months after the death of his father Homer Watts told Mr. and Mrs. Crabb that Marvel did not know anything about these deeds *until after his father's death.*

Tes. of John Crabb, Printed Record p. 259.

Tes. of Mrs. Crabb p. 632, Printed Record p. 257.

And Marvel Watts said the same thing to Judge Fee.

Tes. Judge Fee p. 669, Printed Record p. 261.

We call the attention of the court to the way that Marvel Watts quibbles and evades in relation to the conversation with Judge Fee.

"Q. Now then, in that conversation you and him alone being immediately present and taking part in the conversation did you say to Judge Fee in words or substance that you didn't know anything about these deeds in question until after your father's death, or words to that effect?

A. No, I don't recall that at all.

Q. What say?

A. I don't recall that at all.

Q. Well, what do you say as to whether you did say it or not?

A. I don't *think* I said it.

Q. You don't think you said it?

A. No.

Q. Well, do you know whether you did or not?

A. Why, yes, I wouldn't say that because it wasn't true.

Q. You say you know you didn't say that to Judge Fee?

A. Yes, I am quite sure I didn't. I don't know why I should say it."

P. 564. Printed Record p. 211-12.

No doubt it has now occured to the defendants that there might be a doubt as to whether there was *sufficient delivery of the deeds* if they persisted in their first story, and so they have changed it until now they testify that the deeds were actually delivered and went into Marvel Watts hands *before* his father's death.

THE DEFENDANT HOMER WATTS HAD BEEN ENGAGED IN OTHER SIMILAR TRANSACT TIONS.

The defendant Homer Watts was a lawyer and had more than ordinary knowledge of what it was necessary to do to make a transaction of this kind valid. In ad-

dition to this he was evidently possessed of a great deal of cunning.

He had been lately engaged in a number of other shady transactions by which it has been sought to divert the property of old people away from the natural channel. He had been an attorney in the famous Warner will case for Mabel Warner who was seeking to establish a series of wills and conveyances which were declared by the court fraudulent and invalid.

He had just been engaged in a will contest in the Laroque case in which he himself was the proposed beneficiary and in which an aged Indian had made a will in his favor giving him substantially all the property he possessed to the amount of about $15,000.

In that will, as in this he had used *extraordinary and unusual means* to make the will *apparently* valid. In that case as in this, he had had it written, by some person *other than the beneficiary*—by his own wife.

In that case as in this his protege *Guy Jonas* had been an important witness and taken active part—in that case as in this he claimed *to have been reluctant* to draw the conveyance or have it drawn.

Cross x. of Homer Watts, Record p. 168 and 9.

That the participation in such other frauds is admissible in cases of this kind is clearly shown by the authorities.

Bigelow on Frauds First Edition p. 478, Sec. 9.

There is no better statement of the law in relation to the degree of mental incapacity necessary to set a such deed aside and the effect of undue influence upon such weakened capacity than in the opinion of the Commissioner of Indian Affairs in this case of Watts vs. Laroque issued December 28th, 1914 and afterwards approved by the Secretary of the Interior ,February 17, 1915, in which it was held that although the Indian lived several years after the making of the will and continued to transact business for sometime afterwards and although there was no direct evidence of undue influence yet, the will was held to be invalid and set aside.

In relation to this matter Homer Watts testifies in his cross examination.

"Q. Now at the very time this deed was drawn you were also engaged in a will case in closing the estate of an Indian or half-breed out on the reservation who you claim had willed his property to the amount of about $15,000 to you?

A. Well, Mr. Legrow can answer all that. He is here. He will answer all that.

Q. Well I am asking you.

A. Yes, he made the will. Mr. Legrow is the man that made it I believe.

Q. You testified in that case your wife drew the will?

A. She drew the will but it was executed before these people.

Q. But your wife drew the will?

A. Yes, under the dictation of the old gentleman.

* * * * *

Q. Now in that will he had purported to give you all the property he had, didn't he?

A. Yes, he did,—yes.

Q. And at the time this came up you were in a contest with his heirs over the validity of that will.

A. 1914?, Let's see. I don't know whether I was or not—I expect that is right, yes."

Homer Watts, Printed Record p. 168.

We submit to the court that viewed from the standpoint of these plaintiffs and defendants alone there is no justice whatever in the transaction as contended for by the defendants. The plaintiff Jerusha Crabb does not claim anything but her fair portion of her father's property. There is no just reason why she should not have that. She is the child of the deceased just the same as Homer and Marvel Watts. She is just as close to him by the ties of blood. There is nothing in their claim that they should have the property because they helped to make it. Every one knows that a child educated like these boys were is a burden financially to his parents. Their father supported them and clothed them

in their infancy. He educated them in the public schools while they were little children and then gave them assistance in obtaining unusual education after they were grown to manhood. Every one knows that under such circumstances boys can, at the best, do but very little to assist their parents. They cannot begin to pay for the help and assistance that they are receiving.

Neither is there anything in the claim that the plaintiff should be shut out from sharing in her father's property because she had received a few thousand dollars from her uncle's estate. The defendants had each received, or were about to receive indirectly through their mother, almost as much from their father's estate as she had received from her uncle's, and besides they had received fine educations which enabled them to go out and engage in the battle of life with many advantages. She had received no education whatever except a little, simple education in the public schools. The education that they had received was of far more financial value, and cost far more than the little difference in the amount which they had received, each of them, from their mother or would receive from her in the course of nature and the amount which she had received from the uncle's estate.

Again, Mrs. Marvel Watts, one of the beneficiaries under these deeds, had received from relatives of her own far more in her own right than the amount that Jerusha had received from her uncle's estate.

There is a maxim that has come down from the ages that "Equality is Equity," and we submit that it applies in this case.

It is perfectly evident from the evidence that the defendants Homer and Marvel Watts never had any sisterly affection for their half-sister, who should have been bound to them by the ties of blood.

From the first they have been intending that she should not receive anything substantial from her father. She never had their advantages. She is a simple, uneducated woman, and they, with their fine educations and their supposed standing in society have little use for her. But she has her rights just the same and we think that she has established those rights by the evidence in this case.

The foregoing portion of this brief was prepared before the brief on behalf of appellant was served.

In more direct answer to the brief of appellant, the following is submitted:

THE OLD EQUITY RULE MAKING THE ANSWER OF DEFENDANTS EVIDENCE NEVER APPLICABLE IN A CASE LIKE THIS AND ENTIRELY OBVIATED BY THE NEW EQUITY RULES.

The defendant invokes the old equity rule in the United States Courts that where an answer under oath was not waived by the plaintiff the answer became evidence, and was equivalent to the testimony of two witnesses, or one witness with corroborating circumstances.

This rule was a relic of the time when the testimony of a party was not admissable on the ground that interest made him incompetent.

We submit that it was never applicable in a case like this where the parties have all been witnesses, and have testified fully in relation to the facts, and where the Court has a chance to hear their evidence, probe and examine it and balance it against the circumstances and evidence on the other side.

It would seem foolish to say that after a Court had heard the evidence of each of the defendants given in open Court, and their evidence had been probed by cross examination, and the evidence on the other side had been introduced and balanced against it, and the Court finds that the preponderance is with the plaintiff, that it should be deterred from carrying out that finding because the same parties whose evidence as witnesses

had been fully considered had made sworn answers inconsistent with the finding of the Court.

When Congress changed the practice so that parties to the action might become witnesses, and their testimony weighed in the balance the same as that of any other witness (Revised Statutes, Section 858) it entirely destroyed the reason for the old rule, and it seems that the old rule was entirely destroyed by the new rules.

Mr. Montgomery, in his Manual of Federal Procedure, Second Edition (1918), says in Section 962, Page 407:

> "The answer is no longer evidence, except possibly as containing admissions on the part of the defendant.
>
> Under the old chancery practice the answer was considered as evidence because the testimony of a party was not admissable on the ground that interest made him incompetent. The reason for making the answer evidence disappeared with the change of practice authorized by Sec. 858, Rev. Stats. * * * * *
>
> The new rules conform to the present conditions, the revision omitting or changing all

that existed in the old rules supporting the proposition. Thus old Equity Rule 59, providing for verification of the answer, has been superseded by new Rule 30, which provides for the verification of 'every pleading which is required to be sworn to by statute, or these rules.'

Old Equity Rule 41. 'Answer, when not evidence,' is not contained in the new rules. So, also, there has been omitted from the revision old Rules 42, 43, and 44, relating to answering interrogatories contained in the bill. New Equity Rule 58 is the only relic of the old chancery practice requiring defendants to answer under oath.

The answer could not be evidence under the new rules, as Equity Rule 30 provides: 'The answer may state as many defenses, in the alternative, *regardless of consistency*, as the defendant deems essential to his defense.' In the event of pleading of inconsistent defenses, if the answer were evidence, there would be a conflict of evidence."

BESIDES, IT IS OBVIOUS THAT THE RULE NEVER DID MEAN THAT THE *DIRECT* EVIDENCE OF EVEN ONE WITNESS WAS EVER NECESSARY, OR THAT CIRCUMSTANCES MIGHT NOT BE SUFFICIENT TO OVERTURN THE ANSWER EVEN IN THE ABSENCE OF ANY DIRECT TESTIMONY.

In the case of Clark's Executors vs. Van Riemsdyk, quoted by the appellant, Chief Justice Marshall says:

> "But certainly there may be evidence arising from circumstances *stronger than the testimony of any single witness.*"

In this case the Court found (and was clearly justified in finding) that the circumstances offered in evidence by the appellant were stronger than, and overcome the evidence of, *all* the witnesses on the part of the defendant It, therefore, followed that the effect of the sworn answer of the defendant was effectively overcome even under the old rule.

Any rule that the sworn answers or the direct testimony of the defendant could not be overcome by circumstances which convinced the Court that they were false, would be obviously arbitrary and absurd.

POINTS AND AUTHORITIES SUBMITTED BY THE DEFENDANT UPON THE MERITS.

We have no quarrel with the substance of the legal principles asserted by the defendants, and for which authorities are cited.

We agree, that a person of sufficient mental capacity not unduly influenced, *and acting upon his own judgement*, may make any gift which he sees fit, and dispose of his property as he sees fit, even (where he so acts upon his own judgement) to the extent of beggaring himself or of depleting his own income to the point of comparative poverty, as was done (according to the theory of the defendant) in this case.

We also agree that physical weakness, debility or disease of the body, will not alone destroy the capacity to make a gift where the gift *is in accordance with the real wishes of the donor*, and where there is no undue influence, and his physical and mental condition and the circumstances are such as to permit independent action upon his own initiative.

While some of the authorities cited in defendants' argument are extreme in the language, and are perhaps in some expressions inconsistent with the decision of the Supreme Court of the United States in Allore vs. Jewell, 94 U. S. 506, 24 L. Ed., in which it is said:

> "It is not necessary to prove that the deceased was at the time insane, or in such a

> state of mental imbecility as to render him entirely incapable of executing a valid deed. It is sufficient to show that from sickness and infirmities he was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances imposition or undue influence will be inferred."

'Yet on a whole, the cases cited by defendants do not we think, go farther than the rule as we have stated it.

It is true that a party may give away his property, even to the extent of crippling himself financially, if the circumstances are otherwise unequivocal; but ordinarily it would not be the action of a normal mind so to do.

And we submit to the court that when it is claimed that a sick old man, who needs every bit of his property—who for years has spent every dollar of his income and has not a dollar left in the bank therefrom—has deeded away more than one-half of his entire property absolutely; so that he can no longer enjoy the income from it at all; and has deeded the remainder in such a way that he can no longer sell or hypothecate it or dispose of it in any way for his own benefit, in case of emergency,

—the courts will upon this showing alone, view the transaction with vigorous suspicion, and search it with a quick eye for other circumstances of fraud.

And when in addition thereto, it appears from the evidence, that the deeds were entirely inconsistent with his lately expressed designs as shown by the overwhelming testimony,—that the deeds were drawn under suspicious circumstances and with the utmost possible secrecy—that they were held back from record until after the old gentleman's death and then rushed to the record with unseemly haste,—that the deeds deprived his own blood children, including his only daughter who had affectionately nursed him through his two last sicknesses, and to whom he was obviously much attached, of the smallest interest or remembrance from his property; and *gave it all* to a daughter *-in-law* and a grand-daughter—we submit that the case in its accumulation of circumstances goes far beyond any case cited by the defendant–and even beyond the case of Allore vs. Jewell, or any other case cited by the plaintiffs,—in the moral certainty, that the deeds were not any spontaneous and natural act of the deceased.

And if this conclusion can be still further strengthened it is again added to by the false and contradictory statemants of Marvel and Homer Watts as to Marvel's knowledge of their execution. (See Direct Brief, page 73 and 74). And as to the facts of the recording (Direct Brief, page 67 to 73).

And we submit that the overwhelming weight of these circumstances cannot be overcome by any mere plausible or cunning statement of the party who obtained and drew the deeds; that it was according to the wishes of the old gentleman, or by any unnatural words or reasons which he puts into his dead father's mouth.

We also agree that the burden of proof in the first instance is on the plaintiff to show undue influence, and that if the evidence should be otherwise "exactly balanced" that the plaintiff would fail.

But, we submit to the Court that the "burden of proof" in a case of this kind, where the evidence pro and con has been so fully submitted is, as a final quantity, of but little importance.

It has its place in *controlling the introduction of evidence* and in the *absence of evidence*, but when the evidence on each side has all been introduced it has no office except in a mythical and almost impossible case, where the evidence is "exactly balanced."

It may be that there are cases where this "exact balance" occurs, and therefore where the "burden of proof" turns the scale, but they are certainly exceedingly rare, and this case, we submit to the Court, is far from being such a one.

Here, as was found by the Court below, the circumstances were so overwhelming—the character of the conveyances so improvident and unnatural, and badges of fraud so many, that the case became inconsistent with any other theory than that of unfairness on the part of the defendants, and there was little room for the burden of proof to cut any figure in the final result.

MENTAL CAPACITY:

The Court below did not pass upon the mental capacity of the deceased, assuming that it was "probably" sufficient.

We think that, considering Mr. Watts' age and ill health and exceedingly weak and debilitated condition—the fact that he lay in a stupor the greater part of the time except when under the influence of the strychnine stimulant—the fact that he was unable to get out of bed for two weeks before his death except on the one day when he was carried to the automobile—the fact that he could hardly turn himself in bed, and could not unaided perform the most ordinary function of life—the fact that he could not sign his own name, although he was a man who had always made his own signatures—the Court might well have found that his mind was not

in such a state that he could marshal his own affairs intelligently, provide for his own future, and remember those who would be naturally entitled to his bounty, and intelligently balance their respective claims.

In this regard, it must be remembered that the *improvident character of the transaction itself*, and the fact that it was entirely inconsistent with his previously expressed wishes and intentions, bear upon his *mental condition* as well as upon the question of undue influence.

If a man, who is otherwise weak and debilitated mentally and physically, and in such a state of senility that his mental capacity is otherwise doubtful, makes a conveyance that strips himself in case of his recovery, and is inconsistent with his previous well established wishes and intentions, these facts ought, it seems to us, to turn the scale against his mental capacity.

We think among the many definitions of mental capacity offered, there is none better than that of Mr. Alexander in his new work on Wills, Vol. 1, Sec. 329:

> "A sound mind may be said to exist where the testator has, at the time of making his will, the mental ability to understand and comprehend the nature of the act; the full condition and extent of his property, his relations to the

persons about him, the number and names of those who were the natural objects of his bounty, and regarding such matters *to form a rational judgment.*"

In this regard, it must be remembered that a greater degree of mental capacity is required to sustain a deed than a will.

A will is a natural thing, even although it disposes of all a man's property, because it does not take effect until his death, may be revoked at any time during his life, and only disposes of his property when it is no longer necessary or useful to him.

But a deed which strips himself of his property during his lifetime, and which leave little or nothing to take care of him in his old age, is *prima facie* an unnatural thing.

Bancroft vs. Otis, 91 Alabama 279.
S. C. 24 Am State 908.
In re Will of Alldred, 170 N. C. 153, S. C. 86 S. E. 1047.

In Bancroft vs. Otis *supra* the Court says:

"With respect to testamentary disposition, the primary presumption upon which the whole superstructure of the doctrine of presumed undue influence in contracts and gifts *inter vivos*

rests, is entirely lacking. They take effect upon the death of the donor. They involve no deprivation of use and enjoyment. There can be, with respect to them, no assumption that the donor would not voluntarily part with his property, since, in the nature of things, it must then pass from him to others selected by himself according to the dictates of his affections or appointed by the law of descents and distributions, and in either case without consideration moving to him. It is not out of the usual course of things, but in accordance with the exigencies of mortality that the property should cease to be his, and should become that of another. And the very considerations which lead to suspicion, which must be removed in transactions *inter vivos*—friendship, trust and confidence, affection, personal obligation—may, and generally do, justly and properly, give direction to testamentary dispositions."

These deeds were inter vivos, if they were valid at all. (See authority Supra., Page 15). If they were effectual at all they took his property away from Mr. Watts during his lifetime, and could not be revoked in case of his recovery.

UNDUE INFLUENCE:

As we have already seen, undue influence can seldom be separated from the mental condition of the donor. If his mental condition is perfect, a strong showing of undue influence is required. If, on the other hand, he was mentally weak and physically helpless, a much less showing as to influence is required.

In this case, as we have seen, the most that can be said in favor of the mental condition of Mr. Watts is that it was "doubtful" and perhaps that it may have been *barely sufficient* if left entirely undisturbed.

But with his mental capacity so close to the border line it is obvious that a very little influence would disturb it.

In Thompson on Wills, it is said:

> "While age is not of itself a disqualification, yet it excites vigilance to see that it is not accompanied with incapacity."
>
> (Thompson on Wills, Sec. 84, Page 79.)

Again—

> "Indeed the fact of undue influence is often gathered from all the circumstances surrounding the donor, *his health*, age and *mental condition*," etc.
>
> (Thompson on Wills, Sec. 86, Page 80.)

Again—

> "It must be kept in mind constantly that undue influence is a thing which *need not be proven by direct evidence*—indeed it can seldom be proven by such evidence."

It seems to be the idea of the learned attorneys for the defendants that appellant must fail because there is no *direct proof* of some witness who stood by and heard and saw the influence exercised, and can therefore speak directly as to the same, but it is too well settled to admit of doubt that nothing of this kind is required.

The defendants themselves have made this impossible by their secrecy in the execution of these deeds, and by choosing a time when no one but themselves was present.

It is said in Alexander on Wills, Vol. 2, Sec. 604, Page 911:

> "Undue influence need not be established by direct proof but may be shown by facts from which it may be rationally inferred. From the very nature of things, *it can rarely be proved by direct evidence. It is seldom exercised openly in the presence of others.*"

In Rood on Wills, Sec. 190, Pages 117-118, it is said:

> "But the evidence of undue influence *need not be proved by direct and positive testimony; indeed that would seldom be possible.* * * * Whenever a will at variance with the known previous intentions of the testator or opposed to what would naturally be his desires, is shown to have been executed while he was in the power of the beneficiaries or their emissaries, and at a time when he was too weak mentally or physically to resist them and might easily be deceived, a prima facie case of undue influence or fraud is made out."

Could any case come more fully and squarely within the principles thus laid down by Mr. Rood than this case does under the evidence. Here, the deed was at variance with all the known previous intentions of the testator, and opposed to what would naturally seem to be his desires. It was executed while he was in the power of the beneficiaries or their emissaries, and surely at a time when he was "too weak mentally and physically to resist them."

Again, it is said in Thornton on Gifts and Advanements, Page 449, Sec. 454:

> "Evidence of direct influence used at the time the gift is made is not required. It is very often difficult to show by direct proof the undue influence, *and direct evidence of the actua exercise of such influence is not expected.* Oftentimes the means of keeping the influence out of sight are many and easy of application, and yet the result may be clearly seen. The fact of the influence exerted is very often gathered from the circumstances attending the donor; his health, age and mental condition, how far he was dependent upon and subject to the control of the person benefited: the opportunity which the donee had to exercise his influence, and the disposition of the donor to be subjected to it."

And to the same effect see Thompson on Wills, Sec. 86. Already cited.

In relation to this matter, we cannot do better perhaps than to quote the language and finding of the Court below, who heard all the testimony of the principal witnesses in the case.

"Now, we have the fact satisfactorily prov-
"en that he burned his will of his volition, and
"that his declared purpose in doing so was that
"his children should share equally in his prop-
"erty, Jerusha included. This was manifestly
"the state of his mind when he left the home of
"the Crabbs. In three days thereafter, he
"deeded his property, not to his own sons or
"daughter, but to the wife and daughter of one
"of his sons—persons who had no direct claim
"on his bounty. This was absolutely con-
"trary to all his declarations during the latter
"years of his life; a thing wholly unexpected,
"and unnatural to contemplate from his stand-
"point. No statement was ever made by him
"to anyone, unless it was to Homer, that he in-
"tended to give all his property to Marvel's
"wife and daughter. These things are in
"themselves sufficient to cast the burden upon
"the beneficiaries under the deeds of establish-
"ing that the act of executing them was the
"free and voluntary act of the deceased, with-
"out instigation or direction of any other per-
"son. This the defendants have not done.
"But beyond this, there are suspicious cir-
"cumstances that lead to the inference that
"both Marvel and Homer, especially the latter
"participated in a plan to extort the deeds from
"the father. Marvel brought his father from
"the Crabbs' home to the home of Homer

"against his wish, until persuaded that it
"would be better for him to make the move.
"Homer took his father for the ride against
"his positive wish and desire, and against the
"advise of his physician. Homer states that
"Marvel was present when he went for the
"drive, but is not sure about that. When he
"returned from his office, where the deeds were
"drawn, Homer requested his wife to take Mrs.
"Carden to her home on an errand. She was
"not only taken there, but they went for a
"drive afterwards, which consumed from
"three-quarters of an hour to an hour. In the
"meantime the deeds were executed, with none
"present except the deceased, Homer, and
"Jonas. The deeds were first delivered by
"Homer to Marvel the next day. Marvel
"gave them back to Homer for recording.
"The latter says he neglected to do it. They
"were then handed to the bank, with the re-
"sult that they were gotten into the recorder's
"hands about three hours after the death of
"the grantor. The incidents are unsatisfac-
"torily explained. Further than this, the
"reason given why he wanted Homer to trans-
"act the business puts into the mouth of the
"father language most unlikely to have been
"uttered by him, considering the condition of
"his mind and the circumstances leading up to
"and attending the transaction. When Homer

"according to his testimony, suggested to his "father that he preferred that some one else "should write the deeds, he relates that his "father said, 'Now, Homer, you are the only "one that is going to cause a lawsuit in this "matter, and I want you to attend to it.' A "little later, when asked if he had related all "that his father said about the destruction of "the will, Homer replied: 'No, he said he "made up his mind thoroughly that he had "heard so much property talk since he had "been up there that he knew there was going "to be trouble if he tried to divide the property "as he had expected to in life, and he thorough-"ly made up his mind that he would deed it all "away instead of deeding portions, as he had "talked to me before. And another thing he "said, 'Now, Homer, you are the most likely "one to cause a lawsuit, and I am going to in-"sist on you fixing the property, put you on "your honor that you are not going to deal "with the property or cause any lawsuits.' "And Homer says further: 'I told him that "I was a good loser.'

"The attempt of the witness manifestly is to "impute to his father a reason for not deeding "his property as he had talked of before, which "was that, if he did so, there was going to be "trouble; yet he did the very thing that would "not only not avoid trouble from the source

"Homer alludes to, but was calculated to drive "Homer to a contest. Then the reasoning "proceeds that, in order to prevent him from "making trouble, the deceased insisted that he "(Homer) draw the deeds, for thus he would "be in honor bound not to attack them.

"Such reasoning was entirely too complex "for the old gentleman's understanding at "that time; it is delusive, and is really what, "in the nature of things, would not have hap-"pened.

"The reference to previous trouble between "the children has but a semblance of testimony "in the record to support it.

"After a very careful consideration of the "entire controversy, I am irresistibly impelled "to the conclusion that, while the deceased "was probably possessed of a disposing mind, "yet that it was very weak, as he was physi-"cally, and that, his mind being in such weak-"ende condition, he was imposed upon and "unduly influenced to execute the deeds in "question."

There may be no presumption of undue influence from the near relation of father and child even where the parent is helpless and in the power of the beneficiaries, and we do not contend that it is enough to show a "possibility or suspicion" of undue influence.

On the other hand, neither fraud, force or coercion are essential elements to such influence.

> Alexander on Wills, Sec. 599, Page 906.
>
> Thompson on Wills, Sec. 530, Page 466.

In Alexander on Wills, Supra., it is said:

> "Either fraud or undue influence may exist without the other. Fraud generally is exercised by means of false statements, false pretenses or some direct device or other mode of deception. Undue influence is exercised by persuasion, or importunity, and the like, whereby the mind of the testator through weakness, ignorance, dependence or implicit reliance upon the good faith of another, is subjugated to the will of the one operating on it, thus destroying its free agency."

In Thompson on Wills, Sec. 530, Page 466, it is said:

> "Undue influence may be exercised without actual fraud or false representations made to

the testator. Any fear, or desire for peace, or flattery., or over-persuasion, may amount to undue influence if it was actually exerted and had its effect upon the will."

ARGUMENT BASED ON ABSENCE OF JERUSHA CRABB FROM HER FATHER'S FAMILY DURING HER GIRLHOOD YEARS.

It is true that during these years she did not live with her family, but that was no fault of hers.

She was at a helpless age and had no violition in the matter. No doubt, the stepmother did not desire her presence, and therefore she was turned over to the care of remote relatives. As soon as the influence of the stepmother was abated, the naturally warm and friendly relations between a father and his only daughter began to be restored, and at the time of his death it is plain from the testimony, that the warmest affection existed between them.

Mr. Watts, Senior, seems to have been a just man, and after the influence of the stepmother was broken and the natural affectionate relation between a father and daughter was restored; it does not seem likely that

the fact that under the influence of that stepmother he had entirely neglected her during her girlhood, when he was richly educating his boys, would have been considered by him a reason why he should entirely take from her her share in his patrimony.

ALLEGED SHARE OF BOYS IN MAKING ESTATE.

As we have already seen there seems to have been no just foundation for this claim.

Supra p. 105 - 106

The boys themselves testify that the old gentleman always managed his own affairs, and with their time taken up in obtaining their own exhaustive and expensive education, they were obviously financially a burden rather than an asset. Besides, if any part of their present claim is true, it is perfectly obvious, that this consideration did not in any way influence these deeds, for their claim now is that he *did not give these boys anything at all,* but gave his whole fortune to remote relatives, as to whom there is no claim, that either of them, ever gave the slightest assistance towards accumulating the property.

ALLEGED FRIENDLY RELATIONS BETWEEN DECEASED AND HIS DIVORCED WIFE.

This is, we think, of very little importance, but there is little evidence outside of that of the Watts boys that there was any very friendly relations.

It is true that they continued to live part of the time in the same part of the country, and that they were civil to each other, when they met; but the very fact that after they had raised these children, and lived together many years, they separated and obtained a divorce, is pretty conclusive evidence that they could not get along together.

It must be a pretty bitter feeling that causes old people like these, who have lived together so long, to take such radical and violent proceedings, amounting to the breaking up of the habits of a lifetime. The evidence of Skelton, and of John Crabb and Mrs. Crabb showed that at times he expressed this natural bitterness in no measured terms.

There is no evidence to the contrary except that of the Watts boys themselves, unless it be the evidence of David Taylor.

As we have already seen (pages 76 to 77,) this poor old gentleman had talked so much with all the parties and had so poor a memory, that he admits himself, that he cannot distinguish between what he heard originally himself, and what he has been told by the attorneys and others.

At any rate, the very fact of obtaining the divorce is the very strongest corroboratory evidence that their relations together were not pleasant and agreeable. No doubt, in the later years time and absence from each other, had obliterated some of the bitterness, but it is a significant fact that they never remarried but continued to live separate until the last.

PROPERTY OF THE CRABBS.

It is stated in the Appellants statement of facts that Jerusha Crabb had received from her uncle's estate the sum of ten thousand dollars, and that at the time of Mr. Watts' death that she and her husband had accumulated fifty or sixty thousand dollars of their own.

This is a gross and apparent exaggeration of the facts as shown by the evidence.

She only received from her uncle's estate, over and above the expenses, the sum of nine thousand dollars, and the whole value of the combined worldly goods of herself and husband at the time of her father's death, did not exceed thirty-two thousand dollars. And this included the nine thousand dollars received by her.

This was the testimony of John Crabb, brought out by the defendant in cross-examination. And there

was not a particle of testimony to the contrary, showing or tending to show that they owned fifty thousand dollars, or sixty thousand dollars, or a dollar more than the thirty-two thousand dollars, stated by him.

It is true that the Crabbs, for their walks in life, were fairly well to do; and if the boys, or the people to whom these deeds ran, had been in want, or poorer than the Crabbs; it might be reasonable to suppose, that the old gentleman took that into consideration; and the deeds in question would be more reasonable and probable. But when we consider the fact that each of the Watts boys, was far richer than Jerusha and her husband together, and that Marvel, especially, was worth almost double the two of them, and that each of them had or would receive through their mother (and indirectly from the father's estate) almost as much as she had received from her uncle, and that Mrs. Marvel Watts, to whom one of the deeds ostensibly ran, had received from outside sources, and had in her own right at the date of the deeds, about $15,000—far more than Jerusha had received from her uncle—and that Vernita Watts, the recipient of the remainder of the property—was the sole heir of the joint estate of her father and mother amounting to about two and a half times what Jerusha Crabb and her husband were worth, it seems very clear that neither the fact, that Mrs. Crabb had received a comparatively small sum of money from her uncle's estate, or the modest competence which she and her husband

had acquired, will explain or make reasonable or probable the claim of defendants that her father would leave her out entirely and give *all* of his *forty thousand dollar* property to remoter relatives, who had received more from outside sources, and were far wealthier than she.

ALLEGED DIRECTIONS AND INSTRUCTIONS FROM MR. WATTS, SR., TO HOMER WATTS.

It must be remembered that these alleged instructions and directions, are supported *only* by the testimony of Homer Watts. It is not to be supposed that he and Marvel after arranging this scheme to take her natural share of the property away from their sister, would come into court and admit that they had done so; or that they would fail to support the transaction, by the most plausible story possible.

AGENCY OF HOMER WATTS.

It is not necessary that Homer Watts should have been the authorized agent of Mrs. Marvel Watts, and Vernita. It is enough that they are now adopting and trying to take advantage of his acts.

(See page.) 16

Besides, as we have seen, the circumstances and the conduct of the parties are such that the conclusion is irresistible, that the deeds were deliberately planned between Homer and Marvel Watts, and that the old gentleman was taken from his sick bed by Marvel and brought down and left with Homer, for the very purpose of obtaining some such disposition of the property.

(See page—.) 29 and 39 & 44

FORMER EXPRESSIONS AS TO DISPOSITION OF PROPERTY.

It is urged in the brief of defendants that—

> "Former expressions with respect to the disposition of his property may be taken into consideration."

And to this principle we also subscribe.

But it is the *later*, not the earlier expressions that are important.

Circumstances change, and with these circumstances changes often the mind of the disposing party.

Now what were these *later* expressions? They were constantly and invariable to the effect that he wanted his daughter to share equally with her brothers.

This is what he told Parker—his old friend—and who was in much closer relations with the Watts boys than with the Crabbs. It is what he told Skelton, who did not know any of the parties, frequently during the years 1912 and 1913, and it is what he told the Crabbs themselves according to the testimony of Jerusha and John Crabb and their daughter, Mrs. Wheeler.

These witnesses are undisputed—two of them are entirely disinterested, and the Crabbs are surely entitled to as much credit—witness for witness—as Marvel and Homer Watts.

It is urged that the wills were an expression of his intention that the boys should have nearly all the property and Jerusha but a comparatively small portion.

No doubt this was his intention at that time. But it is significant *that he never made a will, even in those days, by which he gave all or any of his property to his daughter-in-law or grand daughter.*

Their names were not even mentioned in any of the wills.

At that time Jerusha had not re-entered intimately into her father's life, as she did in the last three or four years.

At the time the wills were drawn he was closely associated with his sons and his daughter and her life seemed remote and far away.

Then, he no doubt expected, that she would be the sole heir of her uncle, instead of inheriting only one-third of a half interest in what was considered his property, as she finally did.

At the time these wills were drawn the boys had hardly finished their educations; they were just struggling to get a start and had not yet grown wealthy. At the time the first wills were drawn, he was still living with the boys' mother—Jerusha's stepmother—and no doubt she was filling his mind constantly with the idea that *they* had helped make the property and ought to have

it. According to their evidence, she was still telling him that up to the time of his last sickness

Homer Watts testifies that when she visited the old gentleman on Sunday, April 12, he heard her say to him, "The children that have made it are entitled to it and I would just let it go that way."

(Transcript of Evidence, page 190.)

But in the last three or four years before his death, conditions had changed. After the separation from his wife, her influence was removed. Jerusha had come up into the same general country to live. Under these conditions the natural love of a father for his only daughter reasserted itself. He may have still claimed his nominal home at Athena where his property was located; but it is clear from the evidence, that he was restless and unsatisfied there. He was constantly travelling around, and he seems to have, in fact, lived quite as much with Jerusha at her home during the last years as he did at Athena.

The evidence all shows that he had become greatly attached to her. She had nursed him through two sicknesses, and they were constantly corresponding in the last two years of his life—writing from one to two letters a week to each other.

The fortune which she was expected to inherit from her uncle had shrunken to a comparatively small figure. On the other hand, at this time Homer and Marvel,

largely no doubt by reason of the education he had given them, had succeeded in life and become wealthy in their own right—each of them worth far more than Jerusha—and Marvel's wife had inherited, in her own right, a fortune considerably larger than Jerusha had received from her uncle.

More than this, the boys had each received or was about to receive, from their mother, almost as much as Jerusha had received from outside sources.

Under these changed conditions, his earlier intentions as to the disposition of his property, at the time of making the wills, is of far less importance than his declarations during the last year or two, and just prior to his coming down to Athena in his last sickness.

Just how far the *last will* had been influenced by

Marvel and Homer we can never know. It is urged that it was made before a third party, and when the boys were not immediately present. But it was not necessary for them to be present in order to influence the transaction.

He was living in the same house with one of them at the time and was intimately associated with both.

At any rate, the fact that he sent for the will and

destroyed it—"that he wanted Jerusha to have her share"—is of itself the strongest evidence that he had changed his mind. And indeed, *the very case of the defendants is necessarily based upon the theory that he had entirely abandoned his previous intention as to the disposition of his property.*

On the other hand, his repeated declarations to Mr. Skelton, to Mr. Parker and to the Crabbs immediately before and right up to the time of his last sickness, showed the state of his mind and his intention up to the time he was taken away from St. Johns by Marvel Watts.

It is perfectly plain, that the imaginary claim of the boys, that they had "helped make this property" (instead of being helped by their father) could not have been the influence procuring these deeds, *for the defendants claim that he did not give it to them at all.*

It is equally clear, that Jerusha was not disinherited because she had received $9,000 from her uncle, because her father knew at the time the deeds are claimed to have been executed that Mrs. Watts, to whom one of the deeds ran, *had received a much larger sum from a similar source.*

Much stress is placed in appellants' brief upon the alleged statements of deceased that he did not intend to give his daughter, Jerusha, any part of his property but where is the evidence or any definite statemen, to that effect, *in the last two or three years of his life*, except from the lips of Homer and Marvel Watts?

Of course, as we have said before, it goes without saying, that if Homer Watts and Marvel Watts would deliberately enter into this well planned scheme to rob their sister, they would not hesitate to put any words into their father's mouth which would support their plan.

Therefore, if, as we are contending, the circumstanes show that they did enter into such a plan, the alleged words of their father, which we have only from *their* mouth, cannot certainly go very far towards rebutting those circumstances.

The only other evidence which points in the least in that direction is the indefinite statement of old Mr. Taylor, in which the old man said:

> "He thought she was not entitled to it as much as the boys, something to that effect. He would talk about it that way, and he said he

considered she was the heir of his brother, and he did not think it was necessary to give her much of his estate."

Q. "Now, do you recall about when you had that conversation with him, or would he talk that way more than one time?

A. Well, *I should say now* it was about the time he told me about his will. That same conversation that came up there at Marvel's house."

How clear it is, from the way the old man put this, that he had no definite memory as to the *time* which he heard Mr. Watts talking in this way, "Well, I should say," etc.

In another place in this brief (Page——) we have pointed out how poor and utterly unreliable was old Mr. Taylor's memory as to the time and dates of occurrences, and even as to facts and circumstances. His extreme age and failing memory surely make his testimony of little value, and yet it is the only thing to bolster up the claim of Homer and Marvel that he did not intend to give Jerusha anything, and to overcome the definite and positive statements of Mr. Parker an old friend of the Watts family; Mr. Skelton, an entirely disinterested witness, and Mr. and Mrs. Crabb and Viola Wheeler, five witnesses who testify positively that during the last two or three years of his life old Mr.

Watts was frequently reiterating his intention and desire that his daughter Jerusha should have "her share."

No doubt old man Taylor had at some time in the years when that was his intention, heard Mr. Watts speak to the general effect contained in his statements. We do not question that it had been at one time his intention to give the property to his boys and leave Jerusha out. That was at the time when they were right around him, and when he was still influenced by the arguments of his second wife, who was naturally looking out for the interests of her own boys, and constantly harping on the supposed part those boys had had in building up the property (which we have seen in another place was without foundation, page 76.) But as was stated by the Court below, it is a remarkable thing that no disinterested person has ever heard old Mr. Watts say that he intended to give *all* or any considerable amount of his property to Vernita Watts and to his daughter-in-law.

His alleged disposition of his property was just as *inconsistent with the talk he had had with Taylor* and with other witnesses in the distant years when he was living with his first wife, as it was with his later expressions to Parker, Shelton, Viola Wheeler and the Crabbs.

Again, if he was going to disinherit Jerusha *because she had not helped him make the property,* why should he give it to his daughetr-in-law and to Vernita who *had absolutely never turned a hand towards its accumulation.*

We submit that the course of reasoning by which the learned attorneys for the defendants undertook to explain this and to figure out a plausible theory for any such disposition of his property, is too forced and twisted to be very cogent or forceful.

There might have been a plausible shadow of reason for him to have left Jerusha out and given the property to the boys—there was not even that plausible shadow for him to have left her out and given it all to his daughter-in-law and grand-daughter.

But it is urged that the old gentleman made this unnatural distribution of his property by which he impoverished himself, and took all of his property away from his own children and gave nearly half of it to the wife of one of his sons and the balance to the daughter of that son, with the idea of "avoiding hard feeling" among his children and possible litigation; and cunning words are put into his mouth by Homer Watts to support that theory.

UNREASONABLENESS OF CLAIM THAT OLD GENTLEMAN THOUGHT SUCH A DISPOSITION WOULD AVOID HARD FEELINGS OR LITIGATION

We submit to the Court that no more fanciful or unreasonable theory was ever invented.

Why should any sane man suppose that Jerusha Crab, would be better satisfied, to have *all the property* go to the wife and daughter of one of her brothers, than to have it equally divided between the three or even equally divided between the two brothers?

What sane man would suppose, that Homer Watts, would be better satisfied, to have all the property go to his *brother's wife and daughter*, than to have it equally divided and get his own natural share, while his only sister also got hers?

Both these defendant brothers testify, that they had never had any talk with their father about property affairs, except in a single instance; when they made no suggestion, but simply listened to what he told them.

Why then should the old gentleman have supposed that either Marvel or Homer would be dissatisfied with an equal division or dissatisfied to have their sister have her natural share?

Any man in his right mind would know that the very surest way to avoid litigation, would be to make an *equal* division of the property as the law would divide it.

Any man in the possession of his natural faculties, would know that the very surest way, to create hard feelings *and bring about litigation*, would be to give *all* the property, to the women and children, of one family, and leave all the others *entirely unremembered*.

That Mr. Watts made any such expressions as are put in his mouth by Homer is not only naturally unreasonable but it is inconsistent with all his previous declarations to nearly a half dozen witnesses.

The claim that he did stands on the unsupported testimony of Homer Watts, and as we have seen it is unnatural and improbable.

We do not believe he had any such ideas or made any such declaration; but if he did, they were surely not his own natural, spontaneous ideas, but were injected into his mind by some one else, who cunningly took advantage of his mental feebleness to give him this unreasonable view.

MR. WATTS' FEELINGS TOWARDS HOMER.

It is urged that Mr. Watts did not feel very kindly toward Homer, and this is no doubt true, for he told the Crabbs that Homer was dishonest and would scheme in some way to cheat her out of her share of the property.

But however this may be, it is agreed by all the witnesses, both for plaintiffs and defendants, that during all the latter years, he had the warmest feeling of regard for his daughter. So that there was no reason whatever that any distrust or dislike that he might have for Homer would cause him to disinherit her.

He said to different witnesses that he was always welcome at her house and that she was always good to him.

Indeed, it is likely that the old gentleman felt more at home around her simple ways, and among her homely surroundings, than he did at the more stylish residences of his daughter-in-law.

Very possible his distrust and dislike of Homer may have been one reason why he was dissatisfied with the will, which gave Homer half the property and his daughter, whom he loved nothing.

But however this may be, it is evident that the fact *that she did not get her share,* was the main cause of his dissatisfaction with the will. For he so informed Parker when he had him send for the will, saying that "she was his child the same as the boys and he wanted her to have her share."

And he repeatedly told the Crabbs that he wanted her to have her part.

LIFE INTEREST IN 120 ACRES.

It is urged, that the retention of a life interest in the 120 acres in the deed to Mrs. Watts is a significant circumstance; and this might be true if the deeds had been drawn *by Mr. Watts himself.*

But when we remember that they were drawn by *Homer Watts,* that circumstance loses its significance. From Homer's standpoint such a reservation would make the deeds more probable and plausible. From his standpoint it would hardly do to let the deeds take everything and leave his father actually penniless and without any means of support whatever.

He knew that if the deed were made that way it would

be impossible to make anyone believe that the old gentleman was in his right mind.

We think it was Homer's original intention to have such a reservation in *both* deeds, for there was absolutely no reason to make such a clause in one deed and not in the other. But the deeds were hurriedly drawn, and no doubt, under a good deal of excitement, and the clause in one deed was omitted.

Homer Watts denies this, and in attempted explanation of the matter, makes his father say that he would take the income off of the 120 alone, "because that will be plenty to keep me."

But it is improbable and unreasonable that the old gentleman made any such statement or had any such thought; because the old gentleman, if he was in possession of his faculties, as claimed by the defendants, must have known and did know that the income from this small tract alone *was not* sufficient to take care of him. He must have known, on the contrary, that for many years it had taken the whole income from *all* the property to support him.

According to the testimony of the defendants (who alone know) the income from the entire property had

been about $1,000 per year—little enough to support a sick, feeble old man, who was in the habit of spending his winters in California and generally travelling from place to place.

And the testimony of the defendants, if true, shows that, as a matter of fact, he had been spending that entire income, and did not have a dollar left in the bank or anywhere else in the world at the time of his death.

Is it not the height of improbablility then that he would have said or thought that the income from one small tract alone would be sufficient for him?

CASE OF McCALL vs. McCALL.

Much stress is placed upon the above case in the United States Supreme Court by the learned attorneys for the defendants.

But we submit to the Court that there is nothing in that case that bears upon a case like this.

In that case, the deed was to a son, who had *stood by his father* in a divorce controversy in which the other children had *stood by the mother*, and it was in reference to this state of facts that the Court said:

> "Right or wrong it is to be expected that a parent will favor the child who stands by him, and give to him rather than to the others his property."

How then is this language applicable in this case—at least favorably to the defendants? Here, in the controversy between Mr. Watts and his wife, it will not be claimed that Jerusha had taken sides against him. Neither is there any evidence that the boys had taken sides in his favor.

Here Jerusha had never had any controversy with her father whatever upon any subject, and according to the evidence she had probably stood by him after the divorce from his wife, more closely than anyone in the world. She had cared for him, and made him welcome in health, and she had nursed him in sickness.

That this was with perfect satisfaction to him is shown by the haste with which he hurried to her home when he came from California and his admitted reluctance to leave her when Marvel insisted on taking him away, just before his death.

In the McCall case the plaintiff seems to have depended entirely upon undue influence, unaided by mental weakness.

It seems to have been conceded on all sides in that case that the deceased was in full mental vigor. Again, in that case the deed was in confirmation of a previous parole gift of the property to his son many years before, which was fully proven.

It was with reference to such a state of facts then that the language quoted was used.

We submit to the Court that the case is in no way in conflict with the authorities cited herein, page 11, et seq., in which it is held that the presumptions are against a deed of this kind.

Indeed, the Court in the McCall case directly recognizes that principle, saying:

> "A confidential relation between father and son is thus deduced * * * * which compels proof of valuable consideration and bona fides in order to sustain a deed from one to the other."

We shall not discuss further the statements alleged to have been made by the deceased to Homer Watts alone at different times. Coming from Homer's own own unsupported lips, and supported by the testimony of no other witness, they cannot in the nature of things add anything to his claim as to the way the deed were drawn.

If he procured these deeds to cheat his sister out of her share, he can hardly be expected to admit the truth about the transaction or to fail to invent the most plausible story possible to support it.

His story as to what the old gentleman said is improbable—is discredited by all the circumstances—is in direct conflict with the statements of deceased to other witnesses, and he himself is discredited as a witness by his contradictory statements made to Judge Fee and the Crabbs (Transcript p. 261 and 269) and by his false statements in relation to the recording of the deeds.

HOMER WATTS' EAGERNESS AND ZEAL IN SUPPORTING THESE CONVEYANCES.

The learned attorneys for defendants attempt to

explain the zeal and activity of Homer Watts in the support of these deeds which, according to his claim, disinherited him and gave all the property to his brother's family, by presenting him to the Court as animated by a remarkable spirit of self-abnegation and unselfish determination to carry out his father's exact wishes.

We do not doubt that there are persons who reach such a high moral attitude. We think, however, that the records of will contests will show that such a high standard of feeling is rather rare, even among the best of people.

Not every person would be able to see any justness in the changing and transitory wishes of a very old man, by which he and his family are disinherited entirely for the benefit of the family of another child. Some (and not very many) might remain passive while their father's estate of $40,000 was so disposed of, and might make no contest. There are few indeed, however, who would go so far *as to help to actively plan and carry out such disinheritance*—few who would go to such length in its support and show such activity, zeal and bitterness against those who were attacking it.

We must be pardoned if we do not put Homer Watts in that high class.

We submit to the Court, that the man who was willing and anxious to help deprive his blood sister—daughter of that father—of every dollar of her father's estate.—The man who cared so little for his father during his lifetime that he would let him wander over the country, sick and old—half of the time without even knowing his whereabouts—the man who would go off and leave his father to the care of a hired nurse, alone upon his dying bed, while he went to Pendleton *to enjoy himself at a dance.*—The man who paid so little regard and attention to his father while living that that father who had brought him into the world had grown to hate and dislike him—the man who thinks so little of his father's memory that he is willing and anxious, in order to serve his financial purposes, to dig up and publish to the world a gross scandal involving that father, which had long since been forgotten and which must necessarily stain that father's memory, as he did in this case.—The man whose own father, who knew him best of all the world, believed to be dishonest—the man who was so greedy and avaricious that he is willing to procure by unjust and unfair influence a will in his favor from a half breed Indian—is not the kind of man who would be likely to actively and vigorously and persistently assist in disinheriting himself and his own family for the benefit of a brother's family out of sentimental considerations.

We submit that in the range of all human probability and measuring his conduct by ordinary human stand-

ards, we must look further than this and in a different direction for his motive.

PROPERTY PURCHASED BY MARVEL AND HOMER JOINTLY IN MONTANA.

In this connection, we desire to call the attention of the Court again to this Montana purchase.

We submit that the learned attorneys for defendants are hardly frank with the Court in relation to this matter, in attempting to question this purchase.

Brief of Defendants, page 29.

Homer Watts testified on his cross-examination, in relation to this land, as follows:

> "Q. Are you and your brother large owners jointly in real estate?
>
> "A. Well, *we are owners in this*: A year ago last fall I started to go to Montana and he had a chance to buy some land out there which he said if I would buy with him he would go halvers with me on it.
>
> "Q. You can answer very shortly—are you large owners in real estate?
>
> "A. Yes, about 700 or 800 acres."

This purchase is virtually admitted when they say,

> "True, they now own some lands together, as we understand it, which have been purchased since the old gentleman's death, but at the time of his death and the time of the execution of these deeds they had nothing in common except 160 acres purchased from their mother."

We do not contend, and never have contended, that they owned these Montana lands at the time of their father's death, but the evidence which we last quoted shows conclusively that they did own them and owned them jointly at the time they were testifying at the trial.

We have already shown in our direct argument they were joint owners in about 160 or 200 acres in the neighborhood of Athena.

In addition to this, they were partners together in very extensive farming upon rented lands and in other business.

Of course with their joint relations so intimate and extensive, it is impossible for us to disclose their secret arrangements. But from the nature of the transaction and all the circumstances, and the manner in which they planned and worked together to get their father

down there to Athena, and Homer's conduct in securing these deeds and his subsequent conduct in relation to the transaction, it is unbelievable that he is not to in some way receive compensation for his share in his father's estate.

Of course it makes no difference whether he was to actually get part of this very land or whether *he was to be compensated in some other way.*

Neither is it necessary for us to show that he was compensated at all. It is enough if the circumstances surrounding the transaction, together with the character of the deeds themselves and the previous declarations of Mr. Watts, make it improbable and unlikely that he executed these deeds upon his own initiative and suggestion.

It is admitted that Homer and Marvel are still farming the land conveyed by their father together. But it is argued that they are now accounting for the rents and profits to Mrs. Watts and the child. But there is no showing to that effect, except the unsupported testimony of Homer Watts. They do not produce any bank books or accounts, and neither Mrs. Watts or Vernita testified as to the receipt of any money.

We do not care to discuss the testimony of Guy Jonas, or the sending away of Mrs. Carden, any further than we have already discussed it at pages 85 to 89.

We do not claim that the record shows that Jonas is *now* indebted to Homer Watts. The record is silent as to that; but the important thing is, that Watts was backing him in the saloon business and loaning him money to carry on his business and he was under obligations to him *at the time* he was called as a witness to the will.

Neither do we claim that his being a saloon keeper necessarily discredits his testimony. But it is peculiar that in all that town and among all the neighbors and business men, only a saloon keeper and one in debt to Homer Watts could be found to witness these important papers conveying over forty thousand dollars worth of property.

And we do claim that the character of his business and his relations with and indebtedness to Homer Watts, together with the secrecy that otherwise surrounded the transaction, cast suspicion upon his testimony and strengthen the other incriminating circumstances which surround the transaction.

It is urged in defendants' brief that if a very large number of persons had been gathered in specially to witness the execution of the will, that that might have been indicative of fraud.

And this might be true. Just as the taking of the old gentleman out of his dying bed against his own protest and the protest of his physician, thereby imperiling and in the light of the evidence, actually shortening his life; and parading him in public places for the only time during his last sickness, on this very day that the deeds were to be drawn; is a suggestive act.

No one of these things perhaps is of absolutely controlling importance itself, but altogether, they point so strongly towards a plan and system to which Homer Watts was an active party, that one can hardly resist the conclusion.

As is stated in McCall vs. McCall, cited by defendants, a court of equity searches a transaction like this with a jealous and suspicious eye.

Anything which is unusual and unnatural, is a badge of fraud; and *secrecy* on the one hand, or *ostentatious and unnatural display* upon the other, are equally such badges.

If this transaction had been legitimate it would not have been hidden from the nurse and the doctor, and a couple of neighbors would naturally have been called in to witness the deeds, instead of their being witnessed by Homer Watts himself and by Homer Watts' dependent.

Why was there so much secrecy in the execution of these important papers? Why was the time chosen for their execution when there was no disinterested party present but the nurse, and why was she sent away upon a pretext?

Why should it have been arranged so that neither the doctor, nor the nurse, nor any of his old friends, even saw the deeds or heard that there was any such transaction being carried on?

Why should Homer Watts have signed the deeds himself as a witness, and why should he select as the only other witness Guy Jonas, his saloon-keeper friend and protege from a far distant part of the town?

Why, as we have said, was neither the nurse nor the Doctor, nor any other person permitted to hear a single word of the alleged talk between Homer and his father about these deeds?

Why were they held back from record until after the father's death?

We submit that they were held back, notwithstanding the attempted explanation of the defendants.

Homer Watts claims that he took the deeds down for record on two different days but "forgot" to record them.

But is that reasonable and probable? Here was a transaction involving over forty thousand dollars worth of property—almost as much as Homer Watts' own enrire fortune at the time—a transaction in which he had the liveliest personal interest—a transaction which according to his claim would disinherit him and deprive him of every dollar of his father's estate. If he told the truth, would not such a transaction be constantly in his mind—and rankling in his heart—so immediately at the time of its execution?

Is his story that he "forgot" these deeds under such circumstances, and forgot them on two different days, natural or probable?

There are far too many suspicious things to be explained by defendants in this case—too many improbable explanations.

The reason for holding these deeds back is obvious—the old gentleman *might* possibly recover, and if he did, and found these deeds on record, the whole transaction would be shown up and the boys might not only lose Jerusha's share in the property but their own share as well.

Under these circumstances it was not safe to have the deeds recorded until the old man was actually dead or at least until his speedy death without recovering consciousness was absolutely sure.

Then again the unseemly haste in rushing the deeds to record after the old gentleman was actually dead.

Here again we are met with further improbable explanations.

The deeds they say were handed to the bank, to be sent by mail, on the Saturday before; and it "just happened" that they did not reach the Recorder's office until three and one-half hours after the old gentleman's death.

We think we have shown conclusively on pages 91 to 100 supra that these deeds were never sent to the Recorder's office by mail at all and that all of this explanation, is but another cunning falshood upon the part of the defendants.

The learned counsel in their argument say, that our argument in the main brief at the pages referred to, "is not based upon any foundation."

But they do not in any way attack or disprove the reasoning, or the facts upon which it is based.

They content themselves, on the contrary, with the general statement that *there is no* foundation, and then proceed to palliate as follows:

> "It may be *possible* that Legrow did not mail the deeds until *Sunday morning*, or it may be *possible* that they were placed in the postoffice and the mail *not sent out on Sunday*, or possibly

> they arrived at the Pendleton postoffice and were *not distributed on Sunday*, and that the Sunday's mail was not distributed on Monday morning until after Mr. Burroughs had gotten his mail * * * Any one of these theories is more reasonable than that Marvel Watts and Legrow and Burroughs would testify falsely in relation to the matter."

We submit to the Court that a theory which must be supported by so many bare possibilities is not a probable theory.

As we have already shown, it does not follow from our argument, that Burroughs, or Legrow, or anyone except Marvel Watts, testified falsely, for the testimony of neither is in conflict with our analysis.

Burroughs testifies that he has absolutely no recollection as to how the deeds reached his office, and Legrow only claims to have a dim memory, that they were left at the bank, *either before or after the death of Mr. Watts.*

See Cross-examination of Legrow, Printed Record page 190.

Of course, it would be *possible* that the deeds would not be deposited in the postoffice until Sunday.

But if they were handed in to the bank Saturday morning at eight o'clock, as testified by Marvel Watts, with instructions to mail them to the Recorder, it is unreasonable and improbable that the bank would hold them over the entire day. Banks, as we all know, are highly systematized institutions. They are not likely to neglect their patrons' affairs. If these deeds were placed in their hands to be mailed on *Saturday morning*, it is unlikely and unreasonable that they would have been held over the entire day.

Then even if the deeds were not deposited in the mail on Sturday, how would they come to be mailed *on Sunday*? Banks do not open or do business on Sunday, and if the deeds were left in the bank on Saturday morning and were not mailed on that day, *they would lay over until the bank opened on Monday*; when it would be too late for any train which would get them to Pendleton by 11:20 on Monday morning, the time when they were recorded.

Again, if Legrow had gone down and opened the bank on *Sunday*, for the purpose of getting these deeds and mailing them, it would have been an unusual circumstance, *which he would certainly have remembered.*

Finally, if by any chance the deeds could have been mailed on Sunday, *they would have come down on the Sunday evening train*, and would have been in the post-office Sunday night and Monday morning, *and would have been among the bunch of deeds which had accumu-*

lated on Sunday and which were received by the Recorder through the mail *at eight o'clock that morning*, as shown in the analysis in our main brief already referred to.

The learned counsel in their argument do not attempt in any way to explain the non-production of any check, which according to all the testimony would have accompanied these deeds if they came through the mail, nor further, the failure to show any charge on the bank books for the recording fee, which charge there would certainly have been if the bank had sent down the fee.

The suggestion that these deeds might have been held back in the mail are as improbable and unreasonable as the other.

We all know by experience how prompt and reliable are the United States Mails.

We have seen that these letters must have been mailed Saturday, if they were mailed at all. Is it likely that a large letter containing two deeds, directed to a promi-

nent county officer, would be overlooked by the post-master for two days?

It is obvious that the accumulated Sunday mail *was* distributed before the Recorder's office opened on Monday morning, for *fifteen deeds were received and recorded in a bunch at eight o'clock*—one minute apart, as the Recorder was in the habit of recording them when he received a bunch through the mail.

We submit again, that the conclusion is irresistible, that this story about the mailing of the letters is like many of the other stories and explanations of the defendants, a pure invention, cunningly fabricated, for the purpose of explaining the greedy haste with which these deeds were placed on record after their father's decease.

It is urged in defendant's argument, that the recording of the deeds was unimportant, as the delivery alone might be sufficient to give them effect.

But their own evidence shows that they *thought* itw as important *to have them recorded.*

And so they rushed to the record as soon as it was *safe* to do so. No doubt, they would have recorded the deeds before their father's death if they had dared.

In this connection, we desire to call attention of the Court again to their contradictory statements in relation to Marvel's knowledge of the execution of the deeds before the old gentleman's death, discussed on pages 100 and 102 supra.

Of course, if he did not know about the deeds at all until after his father's death, as he contended at first, and as he and Homer told the Crabbs and Judge Fee, he could not have placed them in the bank on Saturday.

We do not for a moment suppose, however, that his first story about not knowing of the deeds was any more true than his later stories in relation to the transaction.

It simply shows that Marvel and Homer Watts, having made up their mind to put this thing through, and having set their feet in that road, are willing to take any step and tell any story which they think will make the transaction more plausible.

TESTIMONY ON BEHALF OF PLAINTIFF

This testimony consists of the evidence of five witnesses.

This evidence, if true, shows, among other things—conclusively—that up to the time Mr. Watts, Senior, was taken away from St, Johns by Marvel Watts on a trip to Athena—three days before the execution of the deed—that he fully intended that Jerusha should have one-third of his property.

Two of these witnesses, Mr. Skelton and Mr. Parker, are entirely disinterested parties.

The other three are interested, and bear the same relation to the case, as the principal witnesses for the defendants.

THE WITNESS SKELTON.

The learned attorneys for the defendants attack the credibility of the witness Skelton, upon the ground, that many years ago, there was a scandal, about some intimacy between the father of these litigants and Mr. Skelton's wife; and that Mr. Skelton compromised the matter and received $250 from Mr. Watts in settlement of the claim.

But these events were entirely remote from this controversy, both in time and in matter.

Even if the conduct of Mr. Skelton in that matter, had been censurable, it could not legitimately affect his credit in this.

There is no attempt to show that his general reputation was not good and it is a well established principle that you cannot attack or impeach, the credit of a witness, by showing *particular acts of wrong doing.*

State vs. White, 48 Ore. 426;
Leverich vs. Frank, 6 Ore. 213.

The principle has been carried into our Code

Lord's Oregon Laws, sec. 863.

And it was the same at common law.

1 Greenleaf on Evidence (14 Ed.) p. 558.

Mr. Skelton may not have had the best wife in the world. There may be room to suppose that she had been mercenary in the matter.

Mr. Skelton himself may have been censurable for taking two hundred and fifty dollars from Mr. Watts,

and giving it to her to take her back home to her family, as the evidence shows that he did.

Printed Record, P. 123.

Perhaps he should have been more stern and kicked her out among strangers, without a dollar, and shoved her further along down the great white way.

Perhaps he did wrong when, after eighteen months separation, she came back and asked to be forgiven and promised wifely conduct for the future, in taking her back. It may be that he was foolish and indiscreet to forgive Mr. Watts himself when he came back and apologized and asked that it be forgotten, and promised that there should be no future wrong doing.

Perhaps Mr. Skelton is not a man of the very *finest* fiber. Perhaps the Watts boys or their learned counsel, could have adopted some better course—some more Christian policy, under the unfortunate circumstances.

But suppose we assume all this to be true; and that Mr. Skelton's conduct was highly censurable. How does it in any way affect his motive or his credit in this case? *Here he has no interest whatever and no motive to tell anything but the exact truth.* The old gentleman himself has passed on, and Mr. Skelton does not know the Crabbs—never met them until he came as a witness.

He has nothing against the Watts boys—never met either of them in his life. Why should the old trouble, dead and buried for more than ten years, influence him to tell anything but the exact truth, *in this matter*?

We submit to the Court that there never was a more vicious and causeless violation of the rule that "you cannot discredit a witness by remote particular acts," than is shown by the dragging out by the defendants of this old skeleton, which had lain forgotten in the dark closets for a half a score of years and baring the frailties of the man from whose loins they are sprung, in order to throw a slur upon Mr. Skelton and his wife.

It is complained that Mr. Skelton testified that Mr. Watts, in speaking of his divorced wife, said "if there ever was a she devil she was one" or words to that effect. But we see nothing inconsistent in this with the other evidence or with the probabilities. It is true that Homer and Marvel claim that their father and mother were on good terms, and one or two disinterested witnesses testify that they frequently met in public places and treated each other civilly after the divorce.

But the Crabbs on the other hand, testify that he felt bitter towards her, and as we have already tried to show, the very fact that they were unable to live together, and had obtained a divorce at their time of life,

certainly suggests a good deal of bickering and bitter disagreement. Under such circumstances he might not be likely to express his feelings about his ex-wife to *her* sons, who would naturally resent it if he did. But he might do so to persons like the Skeltons, in whose family he had lived a good portion of the time for eight or ten years and with whom he seems to have talked over his family affairs a great deal.

Indeed, he was a very old man, and with an old man's garrulity, he seems to have talked over his family affairs pretty freely with all his old associates.

IN RELATION TO HIS TESTIMONY AS TO MR. WATTS' DECLARATIONS ABOUT THE DIVISION OF HIS PROPERTY BETWEEN JERUSHA AND HER BROTHERS.

It is stated in defendants' brief that Mr. Skelton testified that Mr. Watts had told him, that he wanted Jerusha to have the share of her property, at different times, *before* he made the last will in 1910. But this

is a misstatement of his testimony. A reading of it will show that the time referred to by the witness when he was talking about Jerusha having a share in the property, was when they were at Kennewick, in 1912 and 1913. (Record p. 120.)

And he nowhere testifies that he talked about that at any earlier time.

The learned counsel also intimate in their argument that in his testimony he spoke disrespectfully of "old Watts," but he used no such expression and on the contrary every reference to Mr. Watts in his testimony is in the most respectful terms.

We submit to the Court that there is not a witness in this case who testified with more apparent fairness and frankness than this witness Skelton, and as an answer to the diatribe against him, we ask the Court to read specially, his entire testimony on pages 120 to 123 and say if it does not bear upon every page the evidence of naturalness and truth.

We respectfully suggest that counsel's bitterness towards this witness does not grow out of his manner upon the witness stand or out of any previous relations, but out of the fact that his testimony, like that of Mr.

Parker, shows so conclusively that it *was the intention of the old gentleman when uninfluenced by others, that his daughter Jerusha should have her share.*

TESTIMONY OF MRS. CRABB.

The learned attorneys for the defendants also make a bitter attack on the testimony of Mrs Crabb

We do not contend that Mrs Crabb is a "star" witness. Her memory, somewhat like that of defendants' witness Taylor—is not of the best She is getting along in years herself. She is a simple farmer's wife—she has no education—her mind has never been trained along lines of this kind. She testified that she had never been on the witness stand before in her life. Her life has been a narrow one and confined mostly to the raising of her family. Of late years, as the testimony shows, she has been sick and frail.

> "Care and sorrow, and childbirth pain,
> Have left their traces on heart and brain."

On the stand she was worn and nervous—to her the long examination and the grueling cross-examination were the ordeal of her life.

Under the circumstances it was a wonder that she did not break down entirely.

We submit to the Court that such a woman could not have invented her story and that she could not have withstood such a cross-examination and come through unscathed if she had not been telling the truth.

We submit to the Court, too, that in spite of all these adverse conditions, there is not a serious discrepancy in her testimony. Almost every material fact to which she testifies is corroborated by other witnesses—by Mr. Parker and by her husband and by Viola Wheeler.

The learned attorneys for the defense would have it believed that this simple, inexperienced woman made up her whole story out of whole cloth, and yet the skill of one of the ablest cross-examiners in the state, could not discover a serious flaw; or an important place where her testimony was uncorroborated.

The only discrepancy which counsel attempt to point out on her examination is as to thetime when she first

heard of the will. She says in one place that she first heard it from Marvel when he came up with her father, and at another place that she first heard it from her father.

But how trifling is this discrepancy, when viewed in the light of the inaccuracy of all human testimony. In the first place, it is wholly immaterial, from whom she first heard that there was a will. That she knew it, and learned it about that time, is admitted by everybody. It could make not the slightest difference, from whom she heard it first. The two events were almost synchronous in point of time.

They were virtually the same occasion. Marvel spoke to her about the will before he left and her father a little while after. She did not differentiate between the two occurrences but treated them as one, which they practically were, so far as giving her information about the will.

When compared with the contradictory stories of Homer and Marvel Watts in relation to Marvel's knowledge of the deeds, before his father's death, and their false explanations in relation to the recording of the deeds; how trifling this inaccuracy in the testimony of Mrs. Crabb, in relation to a wholly immaterial matter, becomes.

COMPARISON OF THE TESTIMONY OF MRS. CRABB AND MRS. WHEELER.

It is urged that the testimony of Mrs. Crabb and Mrs. Wheeler, runs along in the same identical language, and that this shows collusion; and counsel broadly intimate, that these witnesses had compared their stories and got them by heart.

But we submit that there is no foundation whatever, for this criticism. The language of these witnesses is not the same, and not any more nearly alike, than would be natural in any two witnesses, describing the same occurrence.

Take, for instance, the circumstance of the burning of the will. Mrs. Wheeler testifies in relation to the circumstance as follows:

> "Q What if anything was finally done with it?
>
> "A. He burned it.
>
> "Q. Well now, go on and state just what happened about that.
>
> "A. He asked for it and mamma gave it to him, and he opened it and read it, and asked her to burn it. And she said she would not do it and he said he would have Mr. Parker burn it. And I told him if he wanted to burn it to burn it himself, and I opened the stove and helped him up and he burned it.

"Q. Now what, if anything, did he say at that time?

"A. He says, 'Now it is done and they will all share equal.' "

Testimony of Mrs. Wheeler, page 66.

Mrs Crabb in relation to the same matter testifies:

"Q. Well now, after he and you had read it what happened?

"A. He asked me to burn it and I told him I wouldnot do it and he said then as he had said before he would *have to wait for Bill to do it* (meaning Mr. Parker.) And Viola was standing at the table and she says, 'Well, Grandpa, burn it yourself. I will open the stove.' *And she took the stove lid off* and lifted him up and *he throwed it in.*

"Q. Did he say anything?

"A. Yes, he said 'Now it is done—with a laugh—you shall have your share equal.' "

Testimony of Mrs. Crabb, p. 99.

Now we submit to the Court that language could hardly differ more in describing the same simple transaction, than does the language of these two witnesses.

And this is true of every incident about which they testified.

After making this unfounded claim, the learned counsel, with seeming disregard of the inconsistency of their position, proceed to critise the testimony of these witnesses, because they *do not*, nearly enough coincide; and it is urged, that the two witnesses differ, as to whether Mrs. Crabb read the will, and as to whether some of the conversations with old Mr. Watts, about the disposition of the property, occurred in the evening or in the morning.

AS TO THE MATTER OF READING THE WILL

In relation to the reading of the will, it was simply one of the hundred thousand cases, in which the mind of one witness, has failed to observe, or to register, or to remember, every feature of an occurrence.

No one can follow the trial of great numbers of cases both originally and upon appeal, as we all know this honorable Court has done; without noting, that where two or more witnesses relate the same transaction, it is almost invariably taht one witness will observe and

register and relate, features that the other witness entirely failed to notice.

As to the other alleged discrepancy, the evidence shows there were two conversations about property, one in the evening and one in the morning, and part of the same matter was talked over at both times.

We do not think there was any discrepancy between the testimony of the witnesses, but if there was, either of the witnesses might be easily mistaken, as to whether a particular statement was made, in one conversation, or the other. And it is utterly and entirely immaterial which was right.

We submit that these criticism as to these little minor, immaterial discrepancies in the testimony, are of little weight.

If these witnesses had gone out and compared their stories and got them by heart, as intimated by the learned counsel, these discrepancies would not have occured. Indeed, Mrs. Crabb sat with her counsel and heard every word of Mrs. Wheeler's testimony and could have adapted her own testimony, to Mrs. Wheelers evidence, if she had desired, and it would not have affected her case, or weakened her right to recover in the least.

The fact that she did not attempt to do do but told her story as she remembered it, without regard to Mrs. Wheeler's memory of the occurrence, is itself the best evidence, that there was no collusion, as counsel would suggest.

NOTHING UNREASONABLE IN THEIR EVIDENCE.

But the learned counsel argues strenuously that there is something unreasonable in their evidence, and want the Court to find, that these three witnesses for the plaintiffs, Mrs. Crabb, Mr. Crabb and Viola Wheeler, have made up their story as to what occurred at the time their father was taken away, without any foundation whatever. And it is unquestionably true that either these three witnesses or Marvel Watts have testified falsely as to what occured on that visit.

In the first place, it is urged that it is unreasonable that these witnesses should have listened to these conversations, when they had, as counsel says, "no particular interest in the property."

But they do not claim they had "no particular interest in the property." They never did claim anything of the kind. They did have an interest in it. The

same interest on the one side that Homer and Marvel Watts had on the other, and they do not and never have made any claim to the contrary.

The witnesses on both sides all agree, that the old gentleman (like many deaf persons) spoke very loud, and when he talked, you could hear him all over the house.

His property was worth over $40,000, and from his great age and debilitated condition it was evident that he was not long for this world. Naturally when he talked about his property Mrs. Crabb, who was a direct heir, and Mrs. Wheeler, the grand-daughter, remembered what he said. It would be more than human nature if they had not. Mr. Crabb seems to have taken less interest than any of them, and he was not so much around the house, yet he heard considerable of this talk

There was nothing strange in Mrs. Crabb looking over her father's shoulder when he was reading the will. She must have done so, for she knew its contents and date, and she could hardly have obtained that information otherwise. She thought Homer Watts' name was signed to it in some way, but of that she was not sure.

His name was in the will and for aught that appears he may have been named as executor. At any rate, it was her impression that his name was on the will. In this she may have been mistaken, and she says she is not sure.

In this connection we want to call the attention of the Court to the fact that the Court below, who heard everyone of these witnesses, Parker, Skelton, Mr. and Mrs. Crabb and Viola Wheeler, testify, and *saw their manner upon the stand*, and had a chance to judge of their actions and conduct, and heard every *word of their testimony, BELIEVED THEIR STORY* and was impressed with its truth. (See Opinion of the Court Transcript, Pages 86 and 87. The learned attorney now asks this Court, upon a mere summary of their testimony in narrative form, without seeing the witnesses or having a chance to judge of their character, to say that they were all perjurors and testified falsely.

MR. WATTS' CONDITION AT THE TIME HE WAS TAKEN AWAY FROM ST. JOHNS.

It is urged that the plaintiffs are relying upon the talk of Mr. Watts, at the time Marvel took him away, as a disposition of his property, in Mrs. Crabb's favor. But this is entirely incorrect.

It was not a disposition of his property at all, and is in no way relied upon by us as such. It simply shows what the wishes and feelings were in his mind at that time, and that he had not, up to that time, changed the intention which he had previously expressed, to Mr.

Skelton and Mr. Parker, and to his daughter and her family; that he wished her to have her share.

We do not think that he was sufficiently in possession of his due and sober faculties at that time,—even under the influence of the stimulant he had taken,—to have made a valid deed or will, even if he had made it in Jerusha's favor.

We have never contended, nor do we contend, that the old gentleman had lost every spark of his intelligence; or that he had ever (except at times when he was in a stupor) entirely lost possession of every part of his faculties. But we do contend earnestly, that a man does not have to lose every element of his intelligence or be an absolute imbecile in order to disqualify him to make a deed like these, or even a will.

We understand that that is the construction put by the learned attorneys for the defendants upon the opinion in Sawyer vs. White, cited from the Court of Appeals for the Eight Circuit, upon which they so much rely.

But we do not so understand that decision. If it is to be given that construction, it is directly in conflict with the controlling decision of the United States Su-

preme Court in Allore vs. Jewell, already cited, in which it is said:.

> "It is *not* necessary that the deceased was at the time insane, or *in such a state of mental imbecility* as to render her entirely incapable of executing a valid deed."

And it would also be inconsistent with the Oregon case of Wolf vs. Harris, 57 Ore. 279, and indeed with the overwhelming weight of authority, as shown by the citations given in the Direct Brief, pages 11 to 14.

We submit that to make, even a valid will, a man must have something more than a fitful and disordered intelligence. He must be able to fairly and soberly marshal the claims of different ones upon his bounty and then soberly and intelligently make up his mind as to what he wishes to do.

And although on that morning he could express himself, and had more or less power of coherence and excited thought (aided somewhat, no doubt, by the stimulant which had been administered) yet we submit to the Court that he had not the sober and controlling intelligence which would make a transaction of this kind valid—that h's mind was, in the language of the authorities, "no longer a safe guardian for his conduct." And if on that morning he had taken a notion, for instance, to make a will giving all his property to Jerusha Crabb, it would not have been valid.

The importance of his utterances then at that time, was not to show any disposition of his property in favor of the plaintiffs but to show the state of his mind and that he still retained his wish and intention that Jerusha should have her share, and the improbability that within three days, he would, of his own uninfluenced motion, disinherit her entirely and leave her without a cent.

It is urged in defendants brief that Mrs. Crabb's statement that her father did not destroy the will when it first came, but after looking at it, asked her to lay it away, and then a few days after, asked her to get it again, at the time it was destroyed; is improbable.

We cannot see any improbability. And what object was there for her to tell the story that way, *if it was no* the truth? It is admitted that the will *was destroyed*; and what possible difference could it make in her case, whether it was destroyed at once, when it arrived, or a few days after, as she has stated?

Her father may not have fully made up his mind when he first got the will back as to whether he would make another will in its place or simply leave the property to be divided according to law.

Again, Mrs. Crabb being unwilling to take any active

part in its destruction, it is likely that he was waiting for Mr. Parker to come in.

It is significant in this connection that at one place in Mrs. Crabb's testimony she says:

> "He asked me to burn it (at the time the will was destroyed) and I told him I would not do it. And he said then, *as he had said before*, he would have to wait for Bill to do it."

Record, page 99.

It is argued that there was no necessity for all this talk, and it is naively asked, "Why did he not throw it in the fire and burn it himself?" If the fire had been as open one, this might be a pertinent and reasonable argument. But when we remember that it was a closed stove that he was sitting by, and that he was unable to get up out of a chair without assistance, let alone opening a hot stove, it does not seem to have any great force.

It was necessary for someone to open the stove and lift him up. And that is exactly what was finally done by Mrs. Wheeler.

Another pick that is made at Mrs. Crabbs' testimony is on account of Marvel's asking her to send for the will and to have it destroyed and leave Homer out. But why should she testify to this if it were not true? It could not help her case in the slightest, and if she *was* going to *make* a story like that, and she and Mr. Crabb and Mrs. Wheeler were all banded together in a conspiracy to corroborate each other, would she not have arranged to have it corroborated by them? If she was *making* the story and they were conspiring together to corroborate her, she could just as easily have had them present as to put it at a time and place, where her unaided word, would stand against that of Marvel Watts.

We do not know what was the motive of Marvel Watts in making this talk—as to that all we can do is to conjecture

It is a significant thing in guessing at his motive that he told her at the time:

> "*Father wanted me to get it*, but I was in a hurry. He wanted me to get it the day we left but I was in a hurry and didn't have time to get it."

This goes a long way in showing how he came to have the talk with her. He knew that the old gentleman was not satisfied with the will. Probably the old gentleman had told him, as he had Parker and Skelton, that Jerusha was his child as well as the boys, and that she had been good to him and ought to have her share. At

ant rate, he knew that the old gentleman *was thinking of making a change.*

It may be that at that time, before he had consulted with Homer, that he would have been actually willing to sacrifice Homer in order to get *half* the property instead of his natural third. It may well be that if Jerusha had fallen into the scheme the property would have been divided between she and Marvel, and that Homer would have been the one making this contest.

But it is still more probable, as it seems to us, that he was feeling Mrs. Crabb out before leaving the old gentleman in her charge. He could not very well refuse his father's request to visit his daughter.

If she had indicated, in response to his suggestions, any disposition to get away with the old gentleman's property, he would not have been left very long in her charge.

But when he found that she was too fair and honorable to go into a scheme to leave Homer out—that she would not even consent to send for the will—he went away fairly satisfied. Fairly satisfied, but not completely so; for he evidently still kept a watchful eye on the transaction. Evidently he knew through the bank, of which he was a stockholder and officer, that the will had been sent for, almost as soon as that occured, and he rushed up there with his family almost immediately after.

When he found the will had already been destroyed (of which Mrs. Crabb made no secret) he rushed back, consulted with Homer and immediately planned to get the old man away from Crabbs' and back under their own influence.

It is also argued that the old gentleman's constant talk about his property, and the disposition of it, while up at his daughter's, as related by her, was unreasonable.

But we think it is only natural under the circumstances. It is plain from all the witnesses that Mr. Watts had grown very childish. When started on one subject his mind would run on that almost continually. Take the evidence of defendants' own witnesses, about the "blue bucket" mines. He would talk about mines continuously and tell the same story over and over. So much was this true that the boys around the hotel would amuse themselves by getting the old gentleman started on this subject. In the last years his mind ran continuously upon his property, and its distribution, after his death. He talked to everybody about it—even to mere acquaintances.

He talked about it to Skelton, to Parker, to Mrs. Barrett, to Dr. Sharp, to Taylor, as well as to the Crabbs.

Indeed, these defendants would have us believe that Homer and Marvel, his sons, were about the only ones with whom he did not talk about his property, previous to coming back from St. Johns the last time.

Towards his last days, like any very old and very childish man, he was very emotional. He would talk about his property and cry over its disposition after he was dead. It is evident that in his last days he wanted his property divided between his children and for Jerusha to have her share.

Perhaps her kindness and the tender care in his last days, when others were more or less indifferent, brought home to him a sense of his own injustice and neglect during the years of her girlhood, when he was giving his boys all the advantages of a fine education, leaving her with none, and in pouring out his wealth so lavishly upon them when she never got a dollar from him.

At any rate, he was worried lest she should not get her share, when he was gone. *He knew his boys and their cunning and persistence*, and he worried lest they should cheat her out of her just inheritance. It is ob-

vious from the testimony that it was on his mind, and when Marvel came up there, and insisted persistently in taking him out of his sick bed, and taking him on this long trip, against his wishes and against the wishes of his daughetr, he reverted at once to the fear and suspicion,*that they would cheat her out of her share*, and his mind was all the more disturbed by reason of its weak and disordered condition. It is perfectly evident that the Crabbs, too, suspected some ulterior motive on the part of Marvel in being so persistent about his removal. Evidently something in their words or actions conveyed this to the mind of the old gentleman. He assured the Crabbs that the property should be equally divided, and he made Marvel promise that this should be done.

Marvel says, "Father, what makes you worry that way?" "What makes you think so?" "What makes you worry about it?" "I will do the thing just right."

It is said in defendants' argument that they seemed to be all the time talking about property. But *who* seemed to be talking about property that evening and morning? There is no evidence to show that any of the Crabbs, except John, said a word to the old gentleman about property. And John's talk was all in the way of soothing him down, (the old gentleman was evidently excited), saying, "That is all right. Now daddy, that is all right, you needn't bother any more about it."

We reproduce John Crabb's testimony as to what took place at this immediate time. It seems to us to

bear the impress of truth. He had been out milking and came back with the milk from the barn and was told that Mr. Watts wanted to see him.

> "And I went in where he was, and Marvel was in there with him. They wasn't talking or saying anything when I went in there, but he was laying on the bed, and he says to me, 'Now John, I am going to Athena', He says, 'Marvel came here to get me and I am going to Athena with him.' And he says, 'I have made arrangements with Marvel and he is to be the administrator of my property', and he says, 'Jerusha shall have her part of that property—he has promised me that.' And Marvel was standing right there. And he took me by the hand—he put his hand out, and I says, 'That is all right, Now Daddy, that is all right. You needn't bother any more about it.' And he seemed to be perfectly contented."

Printed Transcript p. 144 and 145.

We submit to the Court that there never was upon the witness stand a fairer, franker or better witness than Mr. Crabb. Even the learned counsel can find nothing in his testimony to criticise or carp about.

But they say it is unreasonable that the old gentleman should have been talking so much about his property or worrying about it—that there had been no

trouble about property and why should he suppose there would be any?

And yet they want this Court to believe that Homer Watts tells the truth when *he* says, that on the same night, after his long trip on the train, the old gentleman kept him up *until two o'clock in the morning* talking and worrying about his property.

Testimony of Homer Watts, P. 149 and 166

If he was worrying about the property, and he and Homer had a seance about it until a late hour that night why is it improbable that he was talking and worrying and crying about the property when he talked to Skelton when he talked to his daughter and to John Crabb, or when he talked to Marvel up there when Marvel was insisting on taking him away from his daughter's house against the will of everybody there?

It is asked in defendants' argument why Marvel should have said to Mrs. Crabb at the station, that "There has been family trouble enough," when it is urged there had been no family trouble?

But Homer Watts himself recognizes that there *had been* trouble and hard feelings over the property, for

he puts the words into his father's mouth, "He said that us children had had enough difference, or that there had been enough difference in the family." And again, "Let property not divorce you children any longer."

Record, p. 150.

We do not rtake any stock in the story that these boys did not know all about these different wills made by their father, or that they had never talked of property matters with their father or among themselves.

Of course, we do not claim that the last will of October, 1910, was obtained by *physical force* or compulsion. But we do believe that they knew all about it and that it was made at their suggestion. At the time that will was made, Mr. Watts was even then a childish old man—nearly eighty years old. *He was living in the family of Marvel Watts*, and Homer Watts was living in the same town. He was making no secret of the will. He was talking about it to the neighbors—he left it for safe keeping in Marvel's bank. It is not reasonable that a childish old man like that would have made a will at all, without suggestion from some one.

It is pretty plain from Homer's version of his father's talk that he and Marvel had had their squabbles about

the division of the property between themselves, and we do not doubt that they had pestered the old gentleman into the making of this will, even as he told his daughter at the time that it was destroyed.

It is unimportant that they were not physically present at the time the will was made.

Counsel say that Mr. Watts had thought over and made up his mind to give the property to Vernita and her mother before he went up to his daughter's on the last visit. But where is the evidence of any such intention except it comes from Homer and Marvel, and where is the indication *in his conduct* of any such intention, when he left Homer's and Marvel's home on his return from California after *a short week's visit* and hurried up to his daughter Jerusha and remained there happy and contented until Marvel forced him away?

The learned attorneys dwell upon Homer's testimony as to the conversation he claimed to have overheard between his father and the divorced wife. But here,

again, what testimony have we of any such talk except that *of Homer himself*?

To our mind there is something uncannily suggestive in the fact that this divorced wife, appeared upon the scene almost immediately after his return from his daughter's *and was talking to him about his disposition of the property*, and immediately after he is supposed to have made these deeds.

They say the old gentleman sent for her, but what opportunity did he have to send and get her there Sunday. He did not get there himself until late Saturday night, and then, according to the testimony of Dr. McIntyre, he was in a stupor, and he was in a stupor or asleep when the Doctor left the next morning, and yet on Sunday morning this divorced wife and mother of Marvel and Homer was on the scene.

We do not believe that old Mr. Watts sent for her at all, but if he did it was obviously at the suggestion of Homer or Marvel. *Was her presence there for the purpose of renewing the pressure upon the old gentleman, which had borne upon him for so many years in the past, to disinherit Jerusha and give all the property to the boys or their families?*

In another place we have shown how little reliance can be placed upon the testimony of the casual visitors who saw the old gentleman in the automobile when he was taken out against his will by Homer, and carried down town (as it seems to us, for exhibition.) It is admitted that this is the only time he was ever able to get out for weeks before and afterwards until he died. It seems certain that he must have been under the influence of the strychnine tonic at the time, and the only talk these casual acquaintances had with him was about simple matters like his health, which even the most debilitated or insane person can oftentimes answer readily and intelligently.

Much stress is laid upon the case of Sawyer vs. White That decision was a very just one under the facts, but the language of the opinion is certainly very extreme and can hardly be sustained to its fullest extent, unless all other authorities are to be overturned, including the decision of the Supreme Court of the United States, which we have already cited.

Surely a man may have some "small capacity" to understand what he is doing, and yet not be competent to engage in extensive business transactions, and making

a deed which would strip him of the greater part of his competence.

Something is said in the brief of the appellants as to the testimony of the defendants themselves that they did not exercise any influence over the old gentleman, but we submit to the Court that this is to be expected, and we believe a case could hardly be found in all the books where the party charged with undue influence have not testified in the same way, that they did not influence the grantor.

CLAIM OF UNDUE INFLUENCE IN DESTRUCTION OF WILL

Of course, the suggestions in relation to this matter are entirely immaterial, for it is expressly admitted in the pleadings that Mr. Watts died intestate. But we wonder, if the learned counsel, fully realize the position

in which they place themselves, by making this suggestion.

They urge that if the destruction of the will were at issue, there would be "*no escape*" from the conclusion that it was secured through undue influence."

Defendants' Brief, page 95.

Isn't this an admission that the old gentleman was *subject to influence*, even at the time he destroyed this will?

Everyone admits that he was in a far better condition mentally and physically *then*, than he ever was after the bad spell of April 3rd.

At the time the will was destroyed he was not even under a doctor's care. He was able to go to the table and feed himself, to sit up in a chair all day if he wished, and to move around by himself with someone to help him up.

Here there were no suspicious circumstances—no secrecy—everything was done openly and above board—the will was sent for through Mr. Parker, a disinterested party. The old gentleman himself told Mr. Parker about its destruction immediately after, and Marvel Watts was informed as soon as he came up, and while the old gentleman was still alive.

The act itself was a natural one and in accordance with the presumptions of law. It left the property to

go as the law would divide it, and in accordance with the maxim that equality is equity. It did not *deprive Mr. Watts of his property during his lifetime*, and it did not take away the interest of any child.

So that, if the argument of the learned counsel is made in good faith it follows, that *even in their opinion*, the old gentleman was not able to manage for himself or to resist influence, but that he was even then, in such a condition, and so subject to influence, that his action was *presumptively void.*

If this is true, then what are we to say of these unnatural deeds which took the greater portion of Mr. Watts' property away from him *during his lifetime*—which were executed when he was at the threshold of death, and only kept alive by the stimulating drug administered by a physician.—When he could no longer move around or feed himself, or even turn in bed without help—these deeds which are not only unnatural and in derogation of the statutory law itself, but are covered with what the law and common reason alike recognize as badges of fraud and suspicion?

If anything, the law rather favors the destruction of wills, since it leaves the property to be divided equally according to its primary principle. It does not require any witnesses or formalities for the destruction of a will such as are required for its execution. We do not remember of ever hearing of a case in which the destruction of a will was set aside. It would take a strong case, then, an invincible case; and when counsel argue that Mr. Watts was in such a condition clear back at the time the will was destroyed that undue influence *would be presumed, without a single suspicion circumstance,* it seems to us that they concede their whole case away.

The learned attorneys indulge in much speculation in relation to the talk that may have occured between the Crabbs and Mr. Watts while he was their at house, and says that "While upon the surface the testimony of Mrs. Crabb would show that she was disinterested, yet it is not conceivable that this is true."

Mrs. Crabb never claimed that she was "disinterested." Of course, she was interested, and, of course she thought then as she thinks yet that she should not be disinherited or deprived of her share of her father's

bounty. She does claim that she never tried or had any wish to *rob her brothers*, or to induce her father in any way to disinherit them, and every bit of testimony and every circumstance in the case bears her out in this regard, and there is not a single particle of evidence or single circumstance that she had ever made such an attempt.

Something is said in the brief to the effect that there is a discrepancy between the rule laid down by the Supreme Court of the State of Oregon and that of the Federal Court as to the burden of proof. We doubt if there is much discrepancy when the cases are reduced to the last analysis, but in any event, as we have already shown, the burden of proof in a case like this could only be of importance where the testimony was otherwise "exactly equally balanced" and this is not such a case, and it is entirely obvious from the language and findings of the Court as shown herein on pages 124 to 127 that the Court below did not regard them as in any sense closely balanced.

It is obvious that the burden of proof shifts with the circumstances of each particular case. In one case, the admitted surrounding circumstances might be such that the burden to explain them was on the defendant; in

another case, under different admitted circumstances, the burden might be upon the plaintiff.

Here the admitted circumstances were not only that there was fiduciary relation between old Mr. Watts and Homer and Marvel, but also that he was not only very old but was *entirely helpless* and dependent upon them for every want; that the deeds were not executed in the ordinary way but by a "mark"; that they were executed with great secrecy and when only one other person besides Homer Watts was present. All these circumstances were *admitted*, and, this being true, we think the burden in this case was clearly upon the defendant to show to the satisfaction of the Court that the deeds were fairly executed. This, the defendants did not do, but on the contrary every act of theirs, as found by the Court below, tended to darken the transaction and throw upon it more suspicion, and still other circumstances testified to by the overwhelming evidence of other witnesses, though not admitted by the defendants, added to the mountain that bore the defendants down.

It is virtually conceded in the conclusion of defendants' argument that on account of the character of these

deeds and their lack of valuable consideration and Mr. Watts' advanced age and feeble condition, that they are presumptively void and that the burden is upon them to explain them.

Appellants brief p. 97.

But it is claimed that they have sustained that burden and removed the presumption.

We submit to the Court, on the contrary, that almost every step of the evidence has disclosed *some new suspicious circumstance*—some new badge of fraud, by which the natural presumption that a deed by which a man robs himself, without consideration, when he is old and feeble and helpless and dependent, is obtained by undue influence and is void; is strenthened at every stage until it becomes as near irresistible as anything depending on human evidence can become.

We submit that the way in which he was brought down from Athena, at the risk of his life. The fact that the deeds were contrary to his previously expressed intention. The unnatural secrecy in which the transaction was involved. The character and relations of the only witness. The unseemly haste with which it was rushed to record, and the false and conflicting stories as to their execution, all strengthen the conceded presumption which obtained in the first instance.

In conclusion, and by way of summary, we submit

to the Court that the following circumstances make an overwhelming showing against the defendant:

First. That the deceased was at the time of the execution of the deeds, so very old, sick and feeble that he was either entirely incapacitated, or that his capacity was upon the doubtful line where the slightest influence would overturn it.

Second. That he was entirely helpless and dependent upon the Watts family for every want, and for assistance in the performance of every function, so that so that they held, as it were, his very life in their hands, day by day, and hour by hour.

Third. That the deeds in question were unnatural and improvident, considered as between he and the donees alone, since it stripped him of the greater part of his property during his lifetime, and at a time when he needed every dollar of his income.

Fourth. That it was an unnatural distribution, considered as between his different children and the grantees, since it took all of his property away from a beloved daughter and gave *all* of it to remoter kindred, one of whom was not of his blood at all.

Fifth. That this disposition of his property was directly contrary to his declared intentions as expressed frequently during the last two or three years of his life, and recently to Parker and to the Crabbs, up to within three days before the execution of the deeds, and as

shown by his destruction of the will he had previously made, and his statements as to the reasons therfor.

Sixth. That the unnatural conduct of Marvel Watts in taking his father out of his dying bed at his daughters against their wishes and against the advise of the physician and taking him over the long hard trip to Athena, in order that he might be under the influence of Homer, is suggestive of fraud and collusion.

Seventh. That the secrecy of the transaction—the sending away of Mrs. Carden, the nurse, and the execution of the deeds when only Homer Watts and Guy Jonas, his protege and debtor, were the only persons present, is a dark badge of fraud.

Eighth. That the holding back of the deeds from the record until Mr. Watts was dead, and the indecorous haste in which they were recorded after his death, were still further badges of fraud.

Ninth. That the false explanations of the defendants by which they undertook to account for these unusual proceedings, and under their false and contradictory statements to the Crabbs and Judge Fee contradicting their testimony as to the knowledge of Marvel Watts as to the execution of the deeds, is still another strong indication against the defendants.

And in view of the well settled rule, as presented by the authorities, that circumstantial evidence is not only entirely sufficient but is the usual and generally

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And in view of the well settled rule, as presented by the authorities, that circumstantial evidence is not only entirely sufficient but is the usual and generally

the only possible evidence in cases of this kind, we submit to the Court that the circumstances surrounding this transaction are overwhelming and entirely sustain the findings of the Court below.

And we submit to the Court, in all earnestness, that if these deeds can be sustained in the face of all these circumstances, presumptions and badges of fraud, then there is, as it seems to us, no limit upon the cunning and unscrupulous in procuring the disposition of the estates of the old, as long as a transaction is enveloped with sufficient secrecy so that direct evidence of their wrong-doing cannot be obtained.

Respectfully submitted,

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